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# REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

## English Courts of Common Law.

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS.

WITH ADDITIONAL CASES DECIDED DURING THE SAME PERIOD, SELECTED FROM THE CONTEMPORANEOUS REPORTS AND FROM THE DECISIONS IN THE HOUSE OF LORDS, WITH REFERENCES TO DECISIONS IN THE AMERICAN COURTS.

*Hill & Esq.*

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EDITOR.

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1871.

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OF

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DURING THE PERIOD COMPRISED IN THIS VOLUME.

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# CASES

ARGUED AND DECIDED

IN THE

## COURT OF COMMON PLEAS,

IN

### Easter Term,

XXIV. VICTORIA. 1861.

*Willes*

The Judges who usually sat in banc in this term, were,—

ERLE, C. J.

BYLES, J.

WILLES, J.

KEATING, J.

### MEMORANDA.

ON the first day of this term, Mr. Serjt. Hayes, who had received a patent of precedence (to take rank next after Archibald John Stephens, Esq., Q. C.), was desired to take his seat accordingly.

Thomas Wheeler, LL.D., of the Inner Temple, who had been called to the degree of the coif during the last Vacation, also took his seat. He gave rings with the motto "Non sine Labore."

\*In the course of the last Vacation, the following gentlemen were respectively appointed Her Majesty's Counsel learned in the law:—

William Dugmore, Esq., of Lincoln's Inn.

William Anthony Collins, Esq., of Lincoln's Inn.

Henry Warwick Cole, Esq., of the Inner Temple.

John Fraser Macqueen, Esq., of Lincoln's Inn.

Thomas Chambers, Esq., M. P. (Common Serjeant), of the Middle Temple.

Edwin Plumer Price, Esq., of the Inner Temple.

Josiah William Smith, Esq., of Lincoln's Inn.

Richard Baggallay, Esq., of Lincoln's Inn.

Anthony Cleasby, Esq., of the Inner Temple.

Henry Mills, Esq., of the Middle Temple.

The Hon. Adolphus Frederick Octavius Liddell, of the Inner Temple.  
 William Baliol Brett, Esq., of Lincoln's Inn.  
 John Burgess Karslake, Esq., of the Middle Temple.  
 William Digby Seymour, Esq., M. P., of the Middle Temple.  
 John Duke Coleridge, Esq., of the Middle Temple.  
 The Hon. George Denman, M. P., of Lincoln's Inn.  
 George Mellish, Esq., of the Inner Temple.

\*3] \*Ex parte JOSE LUIS FERNANDEZ. *May 3.*

On the trial at the assizes of an information against one C. for bribery alleged to have been committed by him at the election for a member of Parliament, a witness was called on the part of the Crown, who had been examined before a Royal commission appointed to inquire into alleged corrupt practices at that election, and who had received from the commissioners a certificate under the 10th section of the 15 & 16 Vict. c. 57,—indemnifying the witness from “all penal actions, forfeitures, punishments, disabilities, and incapacities, and all criminal prosecutions to which he may have been or may become liable or subject at the suit of Her Majesty, &c., for anything done by him in respect of such corrupt practice,”—and, being asked, “Did you in the month of April, 1859, receive any sum of money from Mr. C.?” declined to answer the question, on the ground that his answer might tend to criminate himself; and, though told by the presiding Judge that the certificate was a complete protection to him, and that he was bound to answer the question, he persisted in his refusal. The Judge thereupon committed him to York Castle for six months, “for having wilfully and in contempt of the Court refused to answer the said question,” and further imposed upon him a fine of 500*l.* :—

Held, that the Court of Assize being a “superior Court,” the Judge had jurisdiction to commit, and was not bound to set out at length in his warrant the cause of commitment,—his decision not being subject to review by the Court above.

UPON the trial at the last assizes at York of an information at the suit of the Attorney-General against one John Barf Charlesworth for bribery alleged to have been committed by him at a late election of a member of parliament for the borough of Wakefield, José Luis Fernandez, who was called as a witness for the Crown, was asked by the Solicitor-General,—“Did you in the month of April, 1859, receive any sum of money from Mr. Charlesworth?” He declined to answer the question, on the ground that his answer might tend to criminate himself.

It was proved that Mr. Fernandez had been examined before a Royal commission appointed to inquire into alleged corrupt practices at the election for Wakefield in 1859, and that he had received from the commissioners a certificate under the 10th section of the 15 & 16 Vict. c. 57:(a) and it was submitted that this afforded the witness a complete indemnity.

(a) The 9th section of that Act enacts, that, “for the more effectually prosecuting any inquiry under this Act, every person who has been engaged in any corrupt practice at or connected with any election of members or a member to serve in Parliament for any county, division of a county, city, borough, university, or place to which any inquiry under this Act relates, and who is examined as a witness, and gives evidence touching such corrupt practice before the commissioners appointed under this Act to make such inquiry, and who upon such examination makes a true discovery to the best of his knowledge touching all things to which he is so examined, shall be freed from all penal actions, forfeitures, punishments, disabilities, and incapacities, and all criminal prosecutions to which he may have been or may become liable or subject, at the suit of Her Majesty, her heirs or successors, or any other person, for anything done by such person or persons, in respect of such corrupt practice; and no person

\*The learned Judge (Mr. Justice Hill) ruled that the witness [\*4 was bound to answer the question, and accordingly put it to him again: and, upon his again refusing to answer it, alleging that he did so under the advice of counsel, who had informed him, that, though protected against any action, information, or indictment for his participation in any corrupt practice at the election in question, he still might be liable to an impeachment by the House of Commons, Mr. Justice Hill, after consultation with Mr. Justice Keating, who was \*sitting in [\*5 the adjoining Court, committed the witness to York Castle for six months, and also fined him in the sum of 500*l.*, for his contempt of Court. The warrant of commitment was as follows:—

“Yorkshire, to wit.

“*The Queen v. John Barf Charlesworth.*

“At the assizes held at the Castle of York, in and for the said county, on Thursday, the 7th day of March, in the 24th year of the reign of our sovereign lady Victoria, by the grace of God, of the united kingdom of Great Britain and Ireland Queen, Defender of the Faith, and in the year of our Lord 1861, before the Hon. Sir Hugh Hill, Knight, and the Hon. Sir Henry Singer Keating, Knight, two of Her Majesty’s justices assigned to take the said assizes according to the statute, &c.

“On the trial of the information against the defendant for bribery alleged to have been committed by him on the election of a burgess to serve in parliament for the borough of Wakefield, José Luis Fernandez, a witness produced, sworn, and examined on behalf of the Crown, having refused to answer a certain question touching the matter in issue in the said information, put to him by Her Majesty’s Solicitor-General, of counsel for the Crown in that behalf, and the Court having adjudged that the said José Luis Fernandez was bound by law to answer the said question, and having required him so to do, he wilfully, and in contempt of the Court, refused to answer the said question; and he having wilfully persisted, and still so persisting in such his refusal, the said Court doth therefore adjudge that the said José Luis Fernandez has been and is guilty of a contempt of Court; and the said Court doth order and adjudge that the said José Luis Fernandez be for such his contempt committed, and he is hereby committed to the custody of the \*sheriff [\*6 of the said county of York, and to his keeper of Her Majesty’s gaol of the Castle of York, in and for the said county, to be there detained and kept in safe custody for the term of six calendar months from the day and year first above mentioned: And the said Court doth further order and adjudge that the said José Luis Fernandez also for

shall be excused from answering any questions put to him by such commissioners, on the ground of any privilege or on the ground that the answer to such questions will tend to criminate such person.”

And the 10th section enacts, that, “where any witness is so examined as aforesaid, such witness shall not be indemnified under this Act unless he receive from such commissioners a certificate in writing under their hands, stating that such witness has upon his examination made a true disclosure touching all things to which he has been so examined: and, if any action, information, or indictment be at any time pending in any Court against any person so examined as a witness in manner above mentioned, for any corrupt practice at any election to which the inquiry made by such commissioners had reference, such Court shall, on the production and proof of such certificate, stay the proceedings in any such action, information, or indictment, and may, in its discretion, award to such person, such costs as he may have been put to by such action, information, or indictment.”

such his contempt shall and do pay to our said lady the Queen the sum of 500*l.*, and that he be further detained in the custody aforesaid until the said sum of 500*l.* shall have been paid.

“By the Court,

“BELL, Associate.”

A motion was made in the Court of Exchequer for a writ of habeas corpus ad subjiciendum to bring up Mr. Fernandez with a view to his being discharged from custody, on the ground that the commitment was illegal. The motion was negatived: see the case reported, 6 Hulst. & N. 717.†

*Bovill*, Q. C. (with whom were *Price*, Q. C., and *T. Jones*), repeated the motion in this Court. [ERLE, C. J.—It is the undoubted right of a superior Court to commit for contempt; and there is no necessity to specify the particular matter which constitutes the contempt: The Case of the Sheriff of Middlesex, 11 Ad. & E. 273, 8 Dowl. P. C. 451 (nom. *The Queen v. Evans*). We could not sit in review upon the grounds on which the Judge of assize acted.] Then, taking the warrant as it stands, it is submitted that it does not justify the imprisonment of Mr. Fernandez. That will depend upon the power of a Judge at Nisi Prius or at the assizes to frame a warrant of commitment so as to prevent the Court above from reviewing the grounds upon which he proceeded. The \*7] same principle will apply to every \*gentleman whose name is inserted in the commission of assize. The dignity of the superior Courts does not extend to all sittings at Nisi Prius or at Chambers. Indeed, it required an Act of Parliament to enable the Judges to do at Chambers many things which otherwise would have to be done by the Court.(a) In *The King v. Faulkner*, 2 C. M. & R. 525, 533,† Lord Abinger says: “A Judge of a Court of record very often is engaged in the performance of functions which are wholly unconnected with his power of committing: a Judge of the Court of King’s Bench who grants a warrant at Chambers is protected, although he should mistake his jurisdiction; but no one would think, that, because he might grant a warrant on an information laid before him, he could, in his private capacity, as a Judge of a Court of record, punish any man for a contempt by fining him. I believe there is no case whatever to be found, where such a Judge has ventured to fine or imprison a person without the authority of the Court. Again, the Judges of the different Courts, whilst discharging their judicial functions, which they have discharged from very ancient times, separately, and in Chambers, as ancillary to the general business of the Court, have never yet ventured to act as Courts of record, although they are Judges of Courts of record: they do not, when they act individually, even when they are discharging part of their judicial functions, assume to themselves the powers of a Court of record; which is illustrated by the instance referred to, that an order of the Judge at Chambers cannot be enforced by attachment, but must first be made a rule of Court, before there is any contempt in violating \*8] it. That is a strong instance to show that a \*man may be acting as a Judge of record, and discharging his judicial functions, without possessing the power of committing for a contempt. It is therefore by no means a necessary inference to draw from the privileges and ex

(a) See 11 G. 4 & 1 W. 4, c. 70, s. 4; and see 1 & 2 Vict. c. 45, s. 1.

emptions and rights of a Judge of a Court of record, to say, when he is acting as a commissioner under the particular clause which defines his duties, that he is to possess the power of committing for a contempt." There is no instance on record of a judge sitting anywhere alone assuming the right to commit under a general warrant. In *The Earl of Shaftesbury's Case*, 6 Howell's St. Tr. 1270, 1 Mod. 144, the House of Lords decided that they had power to commit under a general warrant. But the proceedings were subsequently declared by the House to be "derogatory to the authority of Parliament, and of evil example and precedent to posterity," and were therefore ordered to be vacated. The power of the House of Commons to commit for contempt without showing on the face of the warrant the grounds of commitment, was the subject of grave discussion in the case already referred to of *The Sheriff of Middlesex*. There is no authority to show that this can be done, except by the House of Lords, the House of Commons, and the superior Courts of Queen's Bench, Common Pleas, and Exchequer, sitting in banc. *The King v. Faulkner* decided that a commissioner of bankruptcy appointed under the 1 & 2 W. 4, c. 56, has no power, when sitting alone, under the authority of the 7th section, to fine or commit for a contempt. The Lord Chancellor exercised this power in *Dicas's Case* (*Dicas v. Lord Brougham*, 6 C. & P. 249 (E. C. L. R. vol. 25)); but this objection was not urged. The power of judges to commit for offences of this sort has been watched with extreme jealousy. The matter was very much considered in *Bushell's Case*, Vaughan 135, where one Edward Bushell, a juryman, was committed \*for [\*9 non-payment of a fine of 40 marks imposed upon him and the other jurors for having "contra legem hujus regni Angliæ, et contra plenam et manifestam evidentiam, et contra directionem curiæ in materia legis," acquitted certain persons charged with having, with divers others, unlawfully and tumultuously assembled in a certain street in London to the disturbance of the peace, and discharged on the ground that the warrant of commitment did not disclose circumstances to show that the commitment was warranted by law,—all the Judges being of opinion that the return was insufficient. That was a case of commitment by the Court of Session of Oyer and Terminer at the Old Bailey. Now, it is clear that Courts of Oyer and Terminer and Courts of Nisi Prius stand in the same position in this respect. The Lord Chief Justice in *Bushell's Case* refers to two cases—viz. *Astwick's Case*, F. Moore 839, and *Apsley's Case*, F. Moore 840, where parties committed for contempt were discharged on habeas, and says (p. 140): "In both these cases no inquiry was made or consideration had whether the contempts were to the law Court or equitable Court of Chancery, either was alike to the Judges, lest any man should think a difference might arise thence. The reason of discharging the prisoners upon those returns was, the generality of them, being for contempts to the Court, but no particular of the contempt expressed, whereby the King's Bench could judge whether it were a cause for commitment or not." The proceedings of a single Judge, whether sitting in Court or at Chambers, should always be open to review. This has ever been considered the undoubted privilege of the suitor; and it in no way derogates from the authority or the dignity of the Judge. In *Bacon's Abridgment*, *Courts* (D), treating of the division of Courts, and the subordination of one Court to another, it is said:

\*10] “The most \*general division of our Courts is, into such as are of record, or not: those of record are again divided into such as are supreme, superior, or inferior. The supreme Court of this kingdom is, the High Court of Parliament, consisting of the King, Lords, and Commons, who are invested with a kind of omnipotency in making new laws, repealing, and reviving old ones; and it is on the right balance of these three depends the well-being, and indeed the very being, of our constitution. Superior Courts of records are, again, those that are more principal or less principal; the *more principal* ones are, the Lords House in Parliament, the Chancery, King’s Bench, Common Pleas, and Exchequer; and, by Hale,<sup>(a)</sup> such are justices itinerant ad communia placita and ad placita forestæ. The *less principal* ones are such as are held by commission of gaol delivery, Oyer and Terminer, Assize, Nisi Prius, &c., by custom or charter, as the Courts of the counties palatine of Lancaster, Chester, Durham; or by virtue of Acts of Parliament and the King’s commission, as, the Courts of sewers, justices of the peace, &c.” Thus, the Court of Assize is placed on the same footing as the Court of Oyer and Terminer, the Judge of which, as being one of the *less principal* Courts, according to Bushell’s Case, Vaughan 140, has not authority to commit for contempt generally, without setting out the grounds of commitment so as to enable the Court above to judge of its propriety. Again, in Bacon, tit. *Courts* (D) 3, it is said: “The Courts of Westminster are the superior Courts of the kingdom, and have a superintendency over all other Courts by prohibition, if they exceed their jurisdiction; or writs of error and false judgment of their pro-

\*11] ceedings; and everything is supposed to be done within the \*jurisdiction of the superior Courts, unless the contrary especially appears.” That a Judge sitting at Nisi Prius or at the Assizes has not all the authority of a superior Court, is clear; for, it is laid down in Comyns’s Digest, *Certiorari* (A 1.), that a certiorari may be directed to justices in eyre, or justices of gaol delivery, or of Oyer and Terminer, to remove a record or proceedings before them. The case of *The King v. Clement*, 4 B. & Ald. 218 (E. C. L. R. vol. 6), which is cited in the judgment of the Court of Exchequer as an authority opposed to this application, is in reality a strong authority in its favour. The warrant, which is set out in the report of the motion to discharge Mr. Clement from the fine, 11 Price 68, does in terms disclose the grounds of the order, so that the Court might judge of its propriety. The judgment throughout treats the Judges sitting under the commission of gaol delivery at the Old Bailey, as an inferior tribunal. [BYLES, J.—*Less principal*.] Holroyd, J., in 11 Price 85, referring to the authority of a Judge at Nisi Prius to commit a witness who in defiance of the order of the Court that the witnesses should retire, nevertheless persists in remaining, expressly states that the power of a Judge so sitting is not equal to that of the Judges under the commission then under consideration. [WILLES, J.—He was speaking of a Judge sitting at Nisi Prius at Westminster or in London. The justices of assize represent the most ancient and most honourable of all Judges,—the justices itinerant or justices in eire.] Mr. Holroyd, in his argument in *Burdett v. Abbot*, 14 East 1, 69, speaking of Bushell’s Case says: “That was a case of a discharge by the Court of C. B. of a person committed by a Court of Oyer and

(a) Hale’s *Analysis of the Law*, 35, 36.

Terminer, and not the case of a commitment by a Court of co-ordinate jurisdiction, such as the K. B. or Exchequer. It was upon that distinction that the party was discharged from that \*commitment, on [\*12 account of the cause of the commitment not being particularly stated, so that the Court above might judge whether it was a sufficient cause for detaining the party. Bushell's Case is therefore an authority to show, that, where the cause of commitment can be judged of, as by a superior Court, it ought to be stated; and that, if a sufficient cause be not shown, the Court which has power to judge of it will discharge the party. There are cases in Moore (Astwick's Case, Moore 839, and Apsley's Case, Moore 840) of commitments by the Court of Chancery not stating for what cause, and, on the prisoner's being brought up by habeas corpus, this Court, it is said in Bushell's Case, would not inquire whether the commitments were on the equity or law side, but discharged the prisoner in either case alike. It is not, however, clear whether such commitments might not have been considered at that period as made by a Court not of co-ordinate jurisdiction, which might be a reason for discharging the prisoners where no sufficient cause appeared: for, where it was shown that the cause of commitment was for disobeying a decree, the discharge was refused." (a) Lord Ellenborough here interposed, saying,—“Before you quit Bushell's Case, I wish you to advert to what Lord Chief Justice Vaughan there says (Vaughan 137), that the cause of commitment ought to appear to the Court before whom the commitment is returned as clearly as it appeared to the Court who made the commitment. Is not that laid down generally, or is it confined to commitments by inferior Courts?” To which Mr. Holroyd replies: “He appears to lay it down generally: and that is material in the consideration of the manner in which the cause of commitment is stated in the Speaker's warrant in this \*case.” Again, at p. 72, the learned counsel says: “Nothing can [\*13 be implied in favour of a warrant of commitment not issuing especially from a Court of record, which is not stated in the warrant itself. The opinion of Lord Chief Justice Vaughan in Bushell's Case is most precise to this point. ‘The writ of habeas corpus (he says) is now the most usual remedy by which a man is restored again to his liberty, if he have against law been deprived of it. Wherefore the writ commands the day and the cause of the caption and detaining of the prisoner to be certified upon the return; which if not done, the Court cannot possibly judge whether the cause of commitment and detainer is according to law or against it. *Therefore the cause of commitment ought by the return to appear as specifically and certainly to the judges of the return, as it did appear to the Court or person authorized to commit: else the return is insufficient,*’ &c.” Lord Ellenborough again interposes, and observes,—“Every person must have great respect for the Lord Chief Justice Vaughan, on account of his public virtues: but, how can that doctrine of his, in its full latitude, stand with the cases which have been decided upon the habeas corpus writ?” Holroyd proceeded: “It may, when taken with the exceptions which he afterwards notices, of general commitments for treason or felony, which are admitted to be good: but these, he observes, are not like the cases then under his consideration, viz., cases of commitments for contempts,—‘for, upon a general com-

(a) *Re Allen*, cited in *Apsley's Case*, F. Moore 840.

mitment for treason or felony, the prisoner (the cause appearing) may press for his trial, which ought not to be denied or delayed; and, upon his indictment and trial, the particular cause of his imprisonment must appear; which proving no treason or felony, the prisoner shall have the benefit of it. But, in this case,—i. e., of a commitment of a juryman \*14] for a contempt \*in acquitting persons indicted, against evidence and the direction of the Court,—though the evidence given were not full nor manifest against the persons indicted, but such as the jury upon it ought to have acquitted those indicted, the prisoner shall never have any benefit of it, but must continue in prison when remanded, until he hath paid that fine unjustly imposed upon him, which was the whole end of his imprisonment.” There is nothing, it is submitted, in Lord Ellenborough’s observations in that case to cast the slightest doubt or discredit upon Bushell’s Case. In the case of the Sheriff of Middlesex, 11 Ad. & E. 273 (E. C. L. R. vol. 39),—Where the sheriff had been committed under a warrant of the Speaker of the House of Commons for “having been guilty of a contempt and breach of the privileges of this House,”—Lord Denman says (p. 291, 292), “On the motion for a habeas corpus, there must be an affidavit from the party applying; but the return, if it discloses a sufficient answer, puts an end to the case: and I think the production of a good warrant is a sufficient answer. Seeing that, we cannot go into the question of contempt on affidavit, nor discuss the motives which may be alleged. Indeed (as the Courts have said in some of the cases), it would be unseemly to suspect that a body acting under such sanctions as a House of Parliament would, in making its warrant, suppress facts which, if disclosed, might entitle the person committed to his liberty. If they ever did so act, I am persuaded that, on further consideration, they would repudiate such a course of proceeding. What injustice might not have been committed by the ordinary Courts in past times, if such a course had been recognised! as, for instance, if the Recorder of London, in Bushell’s Case, had in the warrant of commitment suppressed the fact that the jurymen were imprisoned for returning a verdict of acquittal. I am certain that \*15] \*such will never become the practice of any body of men amenable to public opinion.” In Chambers’s Case, Cro. Car. 133, the prisoner was committed “for insolent behaviour and *words* spoken at the council table;” and “because it was not mentioned what the words were, so as the Court might adjudge of them,” the return was held insufficient. [BYLES, J.—That was more like a secretary of state’s warrant.] In The Earl of Shaftesbury’s Case, 1 Mod. 144, 1 Freem. 453, 3 Keb. 792, 2 Show. 336, where the return to the habeas stated that the Earl was committed by the House of Lords “for a high contempt against the house,” Sir T. Jones said (1 Mod. 157), that “such a return made by an ordinary Court of justice would have been ill and uncertain; but the case is different when it comes from this high Court, to which so great respect hath been paid by our predecessors that they deferred the determination of doubts conceived in an Act of Parliament until they had received the advice of the Lords in Parliament. But now, instead thereof, it is demanded of us to control the judgment of all the peers given on a member of their own house, and during the continuance of the session. The cases where the Courts of Westminster have taken cognisance of privilege differ from this case; for, in those, it was only an incident to a case before

them, which was of their cognisance: but the direct point of the matter now is the judgment of the Lords. The course of all Courts ought to be considered; for that is the law of the Court: Lane's Case, 2 Co. Rep. 16. And it hath not been affirmed that the usage of the House of Lords hath been to express the matter more punctually on commitments for contempts; and therefore I shall take it to be according to the course of Parliament. 4 Inst. 50, it is said that the Judges are assistants to the Lords, to inform them of the common law; but they ought not to judge of \*any law, custom, or usage of Parliament." [\*16 And Wylde, J., said: "The return, no doubt, is illegal: but the question is on a point of jurisdiction, whether it may be examined here. This Court cannot intermeddle with the transactions of the High Court of Peers in Parliament during the session which is not determined; and therefore the certainty or uncertainty of the return is not material, for it is not examinable here: but, if the session had been determined, I should have been of opinion that he ought to be discharged." In *The King v. Dugger*, 5 B. & Ald. 791 (E. C. L. R. vol. 7), 1 D. & R. 160 (E. C. L. R. vol. 16), a warrant issued in pursuance of a writ de contumace capiendo stated that the defendant was attached for non-payment of costs in a cause of appeal and complaint of nullity lately depending in the Arches Court of Canterbury; and it was held that the warrant was insufficient, in not stating with certainty the nature of the cause, so as to show that it was one apparently within the jurisdiction of the Ecclesiastical Court. In the judgments of the several Judges in *Howard v. Gossett* and *Gossett v. Howard*, 10 Q. B. 359, 411 (E. C. L. R. vol. 59), no distinction is made between superior Courts of a more or less principal degree: the Courts at Westminster only are evidently alluded to. At pp. 380, 381, Coleridge, J., says: "I pass on to the second answer,—that, with regard to the transcendent powers of the house, and its identity with the people at large, and out of respect to its great dignity, the warrants which it issues are not to be dealt with as those which proceed from tribunals co-ordinate with ourselves, or inferior. I cannot admit that the degree of strictness in which formal accuracy is to be required in warrants has been measured, or ought to be, by the dignity of the Courts from which they issue. Experience has shown that the liberty of the subject, with which we are intrusted, is involved in the accuracy in point of form of legal \*proceedings. For that reason accuracy is required; and in that [\*17 view of it, it is no paradox to say that form becomes substance. The more powerful therefore the source, and the higher in point of rank, the more strictness ought we to show, the more accuracy might reasonably be required. From the wide extent of jurisdiction, indeed, in the one case, and its narrowness in the other, a different rule of intendment exists: but, with this qualification, the rule is as I have stated. And, as it is no breach of respect to suppose that the highest functionary of the most exalted court may improvidently err in point of form, however honest his intention, and as the most mischievous results might flow to the individual or to posterity if the inaccuracy were allowed to pass into a precedent, the more mischievous in proportion to the greater power of the Court, it is no breach of respect, but a bounden duty, respectfully to set such erroneous proceedings aside." And at p. 407, Lord Denman

says:—"At common law, every warrant must speak for itself, and must show two things, a good cause for depriving the party named of his liberty, and some lawful period for his confinement. 'The warrant,' says Lord Coke, 2 Inst. 52, 'containing a lawful cause, ought to have a lawful conclusion.' This is repeated by Lord Hale<sup>(a)</sup> and all the text writers; and it is well established by numerous authorities. Lord Chief Justice Holt asserted this principle in *Bracy's Case*, 1 Ld. Raym. 99, Comb. 390, 5 Mod. 308 (*Bracey v. Harris*): so did Lord Ellenborough in *Ex parte Goff*, 3 M. & Selw. 203; the whole Court, in Lord Tenterden's time, in *Groome v. Forester*, 5 M. & Selw. 314; and the Court of Exchequer in *Daniell v. Phillips*, 1 C. M. & R. 662,† 5 Tyrwh. 293.

\*18] In the last-mentioned case, Parke, B. (1 \*C. M. & R. 673†), expresses himself in the very words of Chief Justice Holt,—'The cause of commitment ought to be certainly stated, to the end that the party may know for what he suffers, and how he may regain his liberty.' The learned Baron proceeds,—'And, if it be not, it is not only a ground for discharging the party, but the warrant is void, and no justification in an action of false imprisonment.' " In *Wickes v. Clutterbuck*, 2 Bingham. 483, 492 (E. C. L. R. vol. 9), 10 J. B. Moore, 63 (E. C. L. R. vol. 17), Best, C. J., says:—"A man is not to be deprived of his liberty by a warrant which only shows that he has committed a trespass by fishing where he had no right to fish. Hawkins, in his *Pleas of the Crown*, a book of great authority (book ii. c. 16, s. 15), says that the offence ought to be set forth with convenient certainty, otherwise the officer is not punishable for suffering the party to escape; and the Court before whom he is brought by habeas corpus ought to discharge or bail him. A man cannot be legally imprisoned whom it is the duty of a Court to discharge, and who may escape with impunity: such imperfect warrants provoke resistance to the officers who are charged to execute them." This is perhaps of all cases one which most imperatively requires that the circumstances should fully appear. The witness, who is not allowed the assistance of counsel (*Doe d. Rowcliffe v. The Earl of Egremont*, 2 M. & Rob. 386), is himself the judge of the effect which his answer to the question put to him may have: *Cates v. Hardacre*, 3 Taunt. 424. In *Fisher v. Ronalds*, 12 C. B. 763 (E. C. L. R. vol. 74), where the question was as to a witness's right to decline to answer a question, on the ground that it might have a tendency to render him amenable to a criminal charge, it was suggested by counsel "that the Judge is to exercise his discretion as to whether or not the claim of privilege is well founded." To which Maule, J., answers,—"No: it is

\*19] the witness who is to exercise his \*discretion, not the Judge. The witness might be asked 'Were you in London on such a day?' and, though apparently a very simple question, he might have good reason to object to answer it, knowing that, if he admitted that he was in London on that day, his admission might complete a chain of evidence against him which would lead to his conviction. It is impossible that the Judge can know anything about that. The privilege would be worthless, if the witness were required to point out how his answer would tend to criminate him." Whereupon the counsel remarked, "If the rule upon this subject is to be so much relaxed as is suggested, it will be impossible in many cases to get evidence at all. The party has

(a) Hale P. C. 584; Hawk. P. C. Book 2, c. 16, p. 237.

no remedy against the witness for refusing to answer; and the Court, it seems, is bound by his statement that the question places him in danger of criminating himself." Maule, J., adds: "The rule is of considerable antiquity; and I am not aware that any great practical inconvenience has been found to result from it. I think you must contend here that the witness's answer could not possibly place him in jeopardy, before you can say that the Judge was wrong in refusing to compel him to give it." And, in giving judgment the same learned Judge says: "We need not decide upon the present occasion that the statement of the witness is conclusive, though I think the Judge is bound by the witness's oath; otherwise, you might exhaust all possibilities consistent with a man's innocence, and so convict him even of murder. The question here put is just one of the questions which would necessarily have been asked on an indictment against the witness for keeping a gambling-house. I think it is impossible to put a case of the more proper application of the rule which protects a witness from criminating himself." In *Adams v. Lloyd*, 3 Hurlst. & N. \*351,† which was the case of [\*20 a motion for interrogatories under the 51st section of the Common Law Procedure Act, 1854, Pollock, C. B., says: "There are some analogous cases in the law which furnish us with assistance on the present occasion, and all of which point to the same conclusion. One is that of a witness who protects himself from answering a question tending to criminate himself: and certainly I have always thought that the law on that subject was correctly stated by Maule, J., in the case of *Fisher v. Ronalds*." The language of Lord Denman in *Green v. Elgie*, 5 Q. B. 99, 112 (E. C. L. R. vol. 48), and that of Littledale, J., and Parke, J., in *Ex parte Leake*, 9 B. & C. 234 (E. C. L. R. vol. 17); 3 Y. & J. 46,† are strong to show that the particular question or questions should have been set out in the warrant, in order that the Court might judge whether or not they were proper. The observations of Parke, B., in *Harrison v. Wright*, 13 M. & W. 816,† are to the same effect. And in *Christie v. Unwin*, 11 Ad. & E. 373, 379 (E. C. L. R. vol. 39), Coleridge, J., distinctly lays it down, that, by whomsoever the order is made, "the facts which gave the authority must be stated."

The Judges sit at the assizes under five several commissions, viz. 1. the commission of the peace, 2. a commission of oyer and terminer, 3. a commission of general gaol delivery, 4. a commission of assize, and 5. a commission of nisi prius: see 4 Inst. 158 et seq.; 3 Bl. Comm 60. In *Bullock v. Parsons*, 2 Salk. 454, Holt, C. J., says: "The authority of the Judge of Nisi Prius is not by the *distringas*, but by the commission of assize; for, it is the 13 E. 1, c. 30, which gives the trial by nisi prius; and by that statute the trial by nisi prius is given before justices of assize." Blackstone, speaking of the Courts of Assize and Nisi Prius,—3 Bl. Comm. 58,—says: "I must also mention an eleventh species of Courts, of general jurisdiction and use, *which \*are de-* [\*21 *rived out of and act as auxiliaries to the foregoing*: I mean the Courts of Assize and Nisi Prius. These are composed of two or more commissioners, who are twice in every year sent by the King's special commission all round the kingdom (except London and Middlesex, &c.), to try by a jury of the respective counties the truth of such matters of fact as are then under dispute in the Courts of Westminster Hall. These judges of assize came into use in the room of the ancient justices in

eyre, justiciarii in itinere, who were regularly established, if not first appointed, by the Parliament of Northampton, A. D. 1176, 22 H. 2, with a delegated power from the King's Great Court, or Aula Regia, being looked upon as members thereof; and they afterwards made the circuit round the kingdom once in seven years, for the purpose of trying causes. They were afterwards directed by Magna Charta, c. 12, to be sent into every county once a year, to take (or receive the verdict of the jurors or recognitors in certain actions, then called) recognitions or assizes; the most difficult of which they are directed to adjourn into the Court of Common Pleas, to be there determined. The itinerant justices were sometimes mere justices of assize or of dower, or of gaol delivery, and the like; and they had sometimes a more general commission, to determine all manner of causes, being constituted justiciarii ad omnia placita: but the present justices of assize and nisi prius are more immediately derived from the statute of Westm. 2, 13 E. 1, c. 30, which directs them to be assigned out of the King's sworn justices, associating to themselves one or two discreet knights of each county. By statute 27 E. 1, c. 4 (explained by 12 E. 2, c. 3), assizes and inquests were allowed to be taken before any one justice of the Court in which \*22] the plea was brought, associating to him one knight or other \*ap-proved man of the county. And, lastly, by statute 14 E. 3, c. 16, inquests of nisi prius may be taken before any justice of either bench (though the plea be not depending in his own Court), or before the Chief Baron of the Exchequer, if he be a man of law: or, otherwise, before the justices of assize, so that one of such justices be a Judge of the King's Bench or Common Pleas, or the King's serjeant sworn." The Courts at Westminster had no control over the justiciarii in itinere. In 4 Inst. 184, it is said: "Their authority was by the King's writ in nature of a commission; they had jurisdiction of all pleas of the Crown, and of all actions real, personal, and mixed: they road from seven years to seven years (but now by the statute of 27 H. 8, c. 24, all justices in eire must be by letters patent under the great seal). In what county soever they came, all other Courts during the eire ceased, and all those pleas in that county, or rising there before any other, the justices in eire might proceed upon as the others might have done. For example, a writ was directed to the justices of the Common Pleas to adjourn and send all the pleas of that county which were in the Court of Common Pleas before the justices in eire, to be determined before them, &c. And, if judgment had been within that county, the justices in eire might award execution without a scire fac." [WILLES, J., referred to 27 Ass. pl. 1,—“En Surrey, à Kingston, en Banke le Roy, devant Sharde,(a) fuit présenté escapement de larens, nient oontristeant le statute que done que tiel choses ne serront pas présentés tanque en eire, les parties fueront mis à reason, car Shard. dit que cest place est eire, et pluis haute que eire, car si eire fuit ass. en un \*23] countie, et Banke le Roy veign. en cel countie, l'eire cessera,” \*&c.] In Comyn's Digest, Courts (B. 1), it is said: "B. R. is superior to justices in eyre: 4 Inst. 73. The justices of B. R. are the sovereign justices of oyer and terminer, gaol delivery, and of the peace, &c., within the realm: 4 Inst. 73. They are the sovereign coroners within the realm. And therefore, if B. R. sits in any county, the

(a) John de Shardelow.

authority of justices in eyre, or other justices of oyer and terminer, gaol delivery, &c., in the same county, ceases immediately." In *Thomlinson's Case*, 12 Co. Rep. 104, a return to a habeas corpus stated "quod infra vocat' Theodore Thomlinson ante advent' istius brevis capt' fuit et custodiæ meæ commiss. ex eo quod dictus Theodorus Thomlinson vinculo sacramenti coram iudice Admiralitatis Angliæ astrictus ad respondend' quibusdam articulis contra eum in dictâ cur. dat., &c., sub pœna quinque librarum, &c., contumaciter examen suum subire recusavit. Idcirco, &c." And it was resolved by the Court "that the return above mentioned was insufficient, as being too general, because it is not specified for what cause or matter Thomlinson was examined, so as it might appear that the interrogatories were of such things as were within their jurisdiction, and that the party ought by law to answer upon his oath; for otherwise he might very well refuse." [WILLES, J.—Justices in eire are certainly now among the more principal superior Courts.] *The King v. Jolliffe*, 4 T. R. 285, and *The King v. Read*, 16 East 404, regard being had to the questions there before the Court, are authorities to show that the Judges of assize, though their authority emanates from the Court above, are not of equal dignity with it.

Then, as to the warrant itself. It does not show what was the nature or description of the Court to which the alleged contempt was shown; neither is it stated that the question which Mr. Fernandez refused \*to answer was one which was material to the issue: nor is it even [\*24 stated that any jury had been sworn. The Judges of assize have but a limited jurisdiction, terminating at the end of the assizes, as the jurisdiction of the Houses of Lords and Commons terminates with the session. [ERLE, C. J.—The commission of assize does not expire until a new one issues: and we know that this particular commission has not yet been superseded by a new one.] The commitment is for six months: the authority might expire before the lapse of that period. [ERLE, C. J.—Formerly the Judges held their offices only during the pleasure of the Crown. Could it therefore be said that they had no power to commit for a definite period, because their authority might in the mean time have been withdrawn?] Further, Mr. Fernandez stands committed until he pays a fine of 500*l.*, without any reference to his ability to pay that sum. That may amount to an incarceration for the rest of his life. [ERLE, C. J.—You had better keep that for the consideration of the Barons of the Exchequer.] The warrant should be so framed as to show upon the face of it the grounds upon which the conviction proceeded. [ERLE, C. J.—Do you think it is convenient or reasonable that a commitment by two Judges at the assizes should be subject to review before every single Judge in succession?] It is a still greater inconvenience that a man should be detained in prison without the power of having the propriety of his commitment considered by a Court of appeal. [ERLE, C. J.—Can there be a doubt that the power to commit which has been exercised does exist in point of law?] It is a power whose exercise has always been watched with the most scrupulous jealousy.

The Court will not fail to remember, that, in upholding the legality of the course pursued by the learned Judge upon this occasion, they will be in effect \*asserting their own personal dignity and authority, and therefore that it behoves them strenuously to guard their [\*25

minds from that bias which it is almost impossible under such circumstances altogether to avoid.

The Court intimated that their decision would be given on the morrow. *Cur. adv. vult.*

ERLE, C. J.—In this case a motion has been made by Mr. *Bovill* for a writ of habeas corpus ad subjiciendum to bring up the body of Mr. Fernandez, a prisoner in York Castle under a warrant of commitment of the Judge who presided at the last assizes at York, on the ground that his commitment and detention under that warrant were unlawful.

It appears by the warrant under which this gentleman is incarcerated, that he was called as a witness for the Crown upon the trial of an information against one John Barf Charlesworth for bribery alleged to have been committed by him on the election of a burgess to serve in Parliament for the borough of Wakefield; that a question which was adjudged to be a lawful question was put to him as such witness, and he refused to answer it, and persisted in such refusal; and that thereupon the Judge adjudged him guilty of a contempt of Court, and accordingly committed him to York Castle for six months, and further adjudged that he should pay a fine of 500*l.* to the Queen.

It appears to me, upon the best consideration that I can bring to bear upon the case, that the warrant was made by a competent tribunal, in respect of a matter within its jurisdiction, and that it is good upon the face of it. We are not a Court of review or a Court of appeal. If Mr. Fernandez feels himself aggrieved by the course which has been \*26] pursued, he may petition \*the Sovereign for relief: but we have no power to question the propriety of what has been done.

In order to sustain his motion, Mr. *Bovill* admits that he must show the warrant of commitment to be void. The ground upon which he seeks to establish the affirmative of that proposition, is, that the warrant does not set out what the question was which Mr. Fernandez refused to answer,—that it does not set out the evidence or the grounds upon which the learned Judge came to the conclusion he did. Whether that could be required of a commitment by any Court, it is unnecessary to decide. If the Court of Assize is a “superior Court,” the objection fails; for, it is as clear and certain as anything can be, that a superior Court may adjudge a man to be guilty of a contempt, and may imprison him for such contempt, without setting forth on the face of the warrant of commitment the grounds upon which its adjudication proceeded. This matter was very learnedly and elaborately discussed in the case of *Burdett v. Abbot*, 14 East 1, in the Court of King’s Bench. It was again elaborately argued before the House of Lords in the same case (5 Dow 199): and, although the question there turned upon the validity of the warrant of the Speaker of the House of Commons, the House of Lords put to the Judges the question whether a general warrant adjudicating a party guilty of contempt, without setting out the evidence, made by one of the superior Courts of Westminster, would be treated as void by another of the superior Courts; and the Judges unanimously answered that it would not; and the House of Lords unanimously adopted that conclusion. The same question was again the subject of extreme discussion in the case of *The Sheriff of Middlesex*, 11 Ad. & E. 273 (E. C. L. R. vol. 39); and the right and power of a Court of superior jurisdiction to issue a warrant of commitment in such form as it should think

fit was \*once more discussed by the Court of Queen's Bench in the case of *Howard v. Gossett*, 10 Q. B. 359 (E. C. L. R. vol. 59). [\*27 The passage in the judgment of Mr. Justice Coleridge in that case upon which Mr. *Bovill* relied for the purpose of showing that everything done by a single Judge sitting at nisi prius may be the subject of review by the Court, was on subsequent consideration in the Exchequer Chamber set right,—that Court holding that the warrant was valid notwithstanding the objections urged, and supporting the doctrine that a superior Court may make a valid commitment for contempt, without setting forth the grounds upon which its adjudication that the party has been guilty of contempt proceeds.

The question, therefore, is reduced to this point,—Is a Court of Assize a superior Court? If it is, the motion fails. If it is not, then it may be that Mr. Fernandez is entitled to the relief he prays.

Two authorities have been mainly relied upon by Mr. *Bovill* in support of the negative, the one direct, the other indirect. The former was the passage cited from Bacon's Abridgment, *Courts* (D); the latter, the judgment of Lord Chief Justice Vaughan in *Bushell's Case*, Vaughan 135. The passage in Bacon is this,—“Superior Courts of record are, those that are more principal or less principal: the more principal ones are, the Lords House in Parliament, the Chancery, King's Bench, Common Pleas, and Exchequer; and, by Hale, such are justices itinerant ad communia placita, and ad placita forestæ. The less principal ones are such as are held by commission of gaol delivery, oyer and terminer, assize, nisi prius, &c.” I will not stop to inquire whether or not the construction which Mr. *Bovill* puts upon this passage is the correct one: but I will assume it to be as Mr. *Bovill* wishes it to be understood. Then it will stand thus, that, in the opinion of the compiler of that work, the Court of \*Assize is a superior Court of a less principal [\*28 degree. The proposition to be established, is, that the Court of Assize is not a *superior Court*. The passage relied on affirms that it is. The words “superior Court of a less principal degree,” I must confess, present to my mind no definite signification, whatever they might suggest to the mind of the learned compiler. He might with equal truth have said that the Court of Common Pleas was a superior Court of a less principal degree than the Court of King's Bench, because at that time the decisions of the former Court were subject to be reviewed by the latter on writ of error. But that circumstance could not in the least degree interfere with the rights and powers of this Court as a superior Court. The passage, therefore, relied upon by Mr. *Bovill*, does not sustain his argument. In a subsequent part of the same book (Bacon, Vol. 2, p. 471), it is said that “Justices of assize, oyer and terminer, and gaol delivery, were appointed in the room of the justices in eyre, who formerly went their circuits in seven years, and superseded the power of the sheriff's torn wherever they came, and transacted all manner of civil and criminal business: these were part of the King's Court, who exercised their jurisdiction in the several counties of the kingdom, and, by communicating with the King's Court, kept an uniformity in the law.” This does not mean anything more than the passage in Co. Litt. 293 b, which is referred to, where it is said that the justices in eire “were called justitiiarii itinerantes, in respect that the justices residing at Westminster were called justiciarii residentes, and

were very like in this respect to the justices of assize at this day, although for authority and manner of proceeding far different. And as the power of the justices of assizes by many Acts of Parliament and other commissions increased, so these justices itinerant by little and little vanished \*29] \*away." But the author of the book, speaking of justices of assize, evidently had his mind carried back to the justices in eyre. Lord Coke, in 4 Inst. 184, says: "They were originally instituted for the good rule of the subjects and for the ease of the counties, and that such as had franchises might claim them. They were called *justiciarii in itinere*, or *itinerantes*, in respect of other justices that were *residentes*. In the black book in the Exchequer, c. 8, they are called *justiciarii deambulantes*, et *perlustrantes*: see Vet. Mag. Cart. 2 part, fo. 72. Artic', et sacramenta in itinere. Their authority was by the King's writ in nature of a commission: they had jurisdiction of all pleas of the Crown, and of all actions real, personal, and mixed: they road from seven years to seven years (but now by the statute of 27 H. 8, c. 24, all justices in eyre must be by letters patent under the great seal). In what country soever they came, all other Courts during the eyre ceased, and all those pleas in that county, or rising there before any other, the justices in eyre might proceed upon as the others might have done. For example, a writ was directed to the justices of the Common Pleas to adjourn and send all the pleas of that county which were in the Court of Common Pleas before the justices in eyre, to be determined before them, &c. And if judgment had been within that county, the justices in eyre might award execution without a *scire facias*." Now, it is clear that the justices in eyre were a Court of equal degree with the *Aula Regia*. The *Aula Regia* was where the King was present; and the justices in eyre were sent abroad into the different counties with all the powers and authorities of the *Aula Regia*, superseding all the local tribunals wherever they came. It is not at all necessary to maintain that Judges of assize are of equal degree with the justices in eyre: but \*30] all the books which treat of the subject agree that they \*possess and exercise many of the rights, privileges, and authorities of those whose functions they have superseded. The history of the Court of Assize is to be found in Magna Charta and all the statutes confirming it. "At the common law assizes were not taken but either in banc or before justices in eyre, and this was a great delay to the plaintiff, and a great molestation and vexation of the recognitors of the assize:" 4 Inst. 158. To remedy this, it is enacted by Magna Charta (9 H. 3, c. 12) that "Assizes of novel disseisin and mort d'ancestor shall not be taken but in the shires, and after this manner: if we be out of this realm, our chief justicer shall send our justicers through every county once in the year, which, with the knights of the shires, shall take the said assizes in those counties; and those things that at the coming of our aforesaid justicers, being sent to take those assizes in the counties, cannot be determined, shall be ended by them in some other place in their circuit; and those things which for difficulty of some articles cannot be determined by them, shall be referred to our justicers of the bench, and there shall be ended." Various subsequent statutes have given to justices of assize increased authority in many cases: 2 Inst. 159. Thus, it seems, that at that early period the justices of assize constituted a Court of a very high degree. By the statute of Westminster 2, c. 30, and the 27

E. 1, c. 4, the jurisdiction to try all civil causes is given to the justices of Nisi Prius, and that duty is incidentally made to devolve upon the justices of assize: and that is the foundation of the practice which prevails at the present day. The authority and dignity of the justices of assize are further provided for by the 4 E. 3, cc. 2 and 11, enacting that none but justices of either bench, and the Chief Baron, and the King's serjeants shall be Judges of assize, and by later statutes which have from time to \*time enacted that other persons shall be added [\*31 to those who were thus qualified to fill the office, viz., the statutes which qualified the other Barons of the Exchequer, the serjeants other than King's serjeants, and King's counsel, to sit as justices of assize. Thus, in the statute-book we find the strongest possible evidence of the Court of Assize being a Court of the highest dignity and importance. The history of the Court is confirmatory of its rights and powers as such. All the Judges in the case of *The King v. Jolliffe*, 4 T. R. 285, treat the authority of the Judge sitting at Nisi Prius as equal to that of the Court from which he is an emanation. To the same effect also is the language of the Court in *The King v. Read*, 16 East 404, though not so strong as in the former case.

Such being the tenor of the authorities to which our attention has been invited, I turn to see whether my own knowledge will lead me to entertain any doubt as to the conclusion we ought to arrive at. Nothing has been adduced by Mr. *Bovill*, nor does my own research furnish me with anything tending to cast doubt upon the point. In the whole course of my somewhat long experience, I never knew of any one sitting as a Judge of assize who entertained a notion that he was sitting and acting other than as a superior Court.

I come now to what I call the indirect authority, viz., *Bushell's Case*, Vaughan 135, 137, to the effect that the tribunal by whom the commitment is made must set out the grounds of the commitment, so that the Court above might have the same means of judging of the propriety of the commitment. These words, taken in their widest sense, would require every tribunal to set out the grounds upon which it proceeds,—which is not true as a legal proposition. The unlimited extent of the proposition is animadverted upon by Lord Ellenborough in *Burdett v. Abbott*, 14 \*East 70; and it is contravened by the whole course [\*32 of the authorities I have before adverted to, which have distinctly laid it down that a superior Court has power to commit for contempt, without setting out in its warrant the particular grounds upon which it proceeded. The large and comprehensive words used in that justly celebrated judgment must be limited by a reference to the particular circumstances of the case then before him,—as, indeed, may be said of almost all cases. That which the Lord Chief Justice was there speaking about was, a most unconstitutional commitment of a jury. The return stated that the prisoner, being a jurymen, among others, charged at the Sessions Court of the Old Bailey to try the issue between the King and Penn and Mead upon an indictment for assembling unlawfully and tumultuously, did, contra plenam et manifestam evidenciam openly given in Court, acquit the prisoners indicted, in contempt of the King, &c. And the Chief Justice observes,—“Another fault in the return is, that the jurors are not said to have acquitted the persons indicted, against full and manifest evidence, *corruptly, and knowing the*

*said evidence to be full and manifest against the persons indicted*; for, how manifest soever the evidence was, if it were not manifest to them, and that they believed it such, it was not a finable fault, nor deserving imprisonment, upon which difference the law of punishing jurors for false verdicts principally depends." Further on he says: "We come now to the next part of the return, viz., that the jury acquitted those indicted against the direction of the Court in matter of law, openly given and declared to them in Court. The words, that the jury did acquit against the direction of the Court in matter of law, literally taken, and de plano, are insignificant, and not intelligible; for, no issue can be

\*33] joined of matter in law, no jury \*can be charged with the trial of matter of law barely, no evidence ever was or can be given to a jury of what is law or not; nor no such oath can be given to, or taken by a jury, to try matter in law, nor no attainr can lie for such a false oath." It is in reference to a case so constituted that that judgment was pronounced. It should also be remembered that at the time that judgment was pronounced, juries were liable to be proceeded against for giving false verdicts. The Chief Justice, in another part of the judgment, says: "I conclude that this return, charging the prisoners to have acquitted Penn and Mead against full and manifest evidence, first, and next, without saying that they did know and believe that evidence to be full and manifest against the indicted persons, is no cause of fine or imprisonment." To my mind, the unlimited extent of the expressions used by the Lord Chief Justice in that very admirable judgment,—which, as was observed by Lord Ellenborough when they were attempted to be used by Holroyd in *Burdett v. Abbott* as Mr. *Bovill* has sought to use them here, cannot "stand with the cases which have been decided upon the habeas corpus writ,"—afford no foundation to justify us in holding this warrant to be void. I find that Chief Justice Vaughan in the course of that judgment adverts to some cases of commitment for contempt by Lord Keeper Bacon, reported in Moore 839, 840; and he seems to deal with them as if the parties had been discharged by reason of the generality of the warrants. Mr. *Bovill* has relied upon these cases in order to fortify his position that the warrant in this case should have disclosed upon the face of it the grounds of the commitment, in order that the Court above might judge of its sufficiency. Upon reference however to Glanville's Case, in the same book, p. 838, it will be seen that there was a sort of contest going on at that

\*34] time between the two jurisdictions; and the precedents there cited are referable rather to that state of things than to any supposed defect of the warrants by reason of their too great generality. The case is as follows:—"Glanville, un prisoner en le Fleet fuit amesnus en Bank le Roy per un habeas corpus; sur quel le garden del Fleet retorne que Glanville fuit commise al Fleet 7 Maii, anno 13 Jac., per mandatum Domini Ellesmere, Domini Cancellarii Angliæ. Et sur examination del cause il appiert que Glanville fuit comise pur le breach d'un decree en Chancery, per que il fuit command que il conuzeroit satisfaction d'un judgement de 800*l.* debt, et 6*l.* damages, que il ad la obtaine vers un Franc. Courtney, le quel judgement fuit entré sur non sum informatus per l'assent des parties. Et quia le ground del debt fuit un jewel d'or ove un diamond vendus et affirme par Glanville d'estre un bone diamond, lou en verity ceo fut forsq. un topaz, per que Court-

ney fuit cozen et deceive, car le jewel fuit vend per 300*l*. lou ne fuit ouster le value de 30*l*., ideo le Chancery decree que le dit Glanvile reprendroit le jewel, et averoit 100*l*., et conuzeroit satisfaction del judgement, coment que le judgement fuit affirme per error. Sur quel matter le Bank le Roy deliver Glanvile, et le Chiefe Justice Coke dit que le suit en Chancery puis le judgement done al common ley fuit encounter le statute de 27 E. 3, c. 1, et 4 H. 4, c. 23. Et il cite un president en 5 E. 4, que Cob port debt versus Nore, un merchant ouster le mere, et procure un attorney d'apperer pur Nore, et obtaine judgement, et il auxi procure un br. d'error d'estre port en le nosme de Nore, et le judgement d'estre affirme: puis que Nore revient del ouster le mere, et pur cest practice preferre un bill en Chancery. Et fuit resolve per tous les justices, que Nore ne fuit relievable en le Chancery, mes solement en parliament per reason del dit judgement, coment que le case fuit pleine d'equity. Auxi il cite un auter president, Mich. 39 & 40 Eliz. un Tho. Throckmorton's Case, que fuit tiel. Thomas Throckmorton tient le mannor [\*35 de Wotton, in comitatu Ebor., pur ans del demise la Roigne Mary, rendant rent, ove cesser, come est usual en leases le Roy, et le lessée mista son servant de payer son rent eins le receipt de l'Exchequer deins les 40 jours, mes les servant ne ceo pay tanques apres le jour, pur que le lease en temps la Roigne Mary fuit void, uncore nul advantage prise mes le rent accept tanques 33 Eliz. que la Roigne Eliz. grant le terre al Sir Thomas Hennage, que fist lease al Sir Moyle Finch: et sur information en l'Exchequer le lease fuit adjudge void. Per que Throckmorton voilloit aver sue en Chancery: mes tous les justices agreeont que il ne fuit relievable la, pur reason del judgement done devant." And the reporter adds,—“Nota, que puis cest delivery, le Seignior Chancellor lui commit arreare pur mesme le matter, sur que Glanvile port un auter habeas corpus, 12 Jac., et sur ceo fuit arreare deliver Trin. 13 Jac. Et Coke, Chiefe Justice, cite un president, 19 Eliz., lou Michel, un prisoner en le Fleet sua un habeas corpus en Bank le Roy, et le gardein del Fleet retourne que il fuit comise per Nicholaum Bacon, milit., custodem magni sigilli Angliæ; et sur cest retourne le prisoner, fuit baile.” The ground, therefore, seems to have been, not that the warrants were too general, but that the parties being entitled to their judgments, the Court of common law would not allow the Court of Chancery to interfere. I therefore think those cases are of no great weight or bearing on the present. Many of the cases adverted to were cases of commitments for contempts alleged to have been committed before the Privy Council, the Court of High Commission, or the Star Chamber, in respect of which the Courts at Westminster may have been well justified in holding that the jurisdiction had been exceeded, \*and that [\*36 those tribunals had no right so to administer the law. Much has been said about the case of *The King v. Clements*, 4 B. & Ald. 218 (E. C. L. R. vol. 6). I do not think it has much bearing upon the question now before us. In that case, one Thistlewood was put upon his trial at the Old Bailey upon an indictment for high treason; and Lord Chief Justice Abbott, then being one of the justices before whom Thistlewood was to be tried, before the commencement of the trial stated publicly, that, as there were several persons charged with the offence of high treason by the same indictment, whose trials were likely to be taken one

after another, he thought it necessary strictly to prohibit the publishing of any proceedings of that or any other day, until the whole trial should be brought to a conclusion; and that it was expected that all persons would attend to that admonition. In defiance of this injunction Mr. Clements published a report of the trial in the Observer, of which he was the proprietor; whereupon he was called upon to answer for his contempt, and in default of appearance was fined 500*l*. The Court of Queen's Bench held that the learned Judge had jurisdiction to make the order. The case came afterwards before the Court of Exchequer, 11 Price 68, upon a motion to discharge Mr. Clements from the fine, on the ground amongst others that the orders were illegal. I do not find that that case has any bearing upon this, though it appears to have been adverted to as warranting a proposition which when considered it does not warrant. The great point there was, the authority of the Judges sitting at the Old Bailey to commit for an offence not committed *in Court*, so as to render the exercise of such extraordinary power in the Court a matter of necessity, in order to enable the Court to proceed in the discharge of its duty, by instantly repressing or removing it. I merely mention the case because it has been so much pressed upon our attention.

\*37] \*Some general considerations were pressed upon us by the learned counsel as to the sacredness of the liberty of the subject, and the writ of habeas corpus being almost a matter of right, and so forth. But, to my mind, before I can hear it said that the liberty of the subject has been invaded, it is necessary to show that the imprisonment has been contrary to law. Now, the presumption is that all has been rightly done, and that the imprisonment has taken place in due course of law. The commitment being the act of a lawful Court acting within its competency, there can be no invasion of the liberty of the subject in the sense in which the phrase is used. To issue a habeas corpus for the purpose of reviewing the decision of the Judge, would be to my mind a gross abuse of the process. The writ would, I think, be most perniciously applied, if sought for on that ground; witness the numerous applications for writs of habeas corpus to bring into question the validity of judgments and other proceedings, which have invariably failed. That principle ought to be adhered to. Unless there is reasonable ground for thinking that the commitment was void for want of setting forth in the warrant the facts which would show the offence and the jurisdiction of the Judge to deal with it, I am clearly of opinion that no foundation is laid for this motion.

As to the alleged danger of abuse in the exercise of the power of commitment by a Judge of assize, it may be answered that there is no power or privilege, however valuable or beneficial to the public, which is not capable of being perverted to an evil use.

We have also been most strenuously urged to remember, that, in upholding the present commitment, we are in effect asserting our own powers and privileges and our personal dignity: and therefore we are called upon especially to guard ourselves from being moved by considerations which are almost \*inseparable from human frailty. These \*38] observations, however, are entirely founded in mistake. The Judges of assize are by their commission commanded to do what to justice may appertain, to redress wrongs, &c.; and, in the discharge

of these important functions, they are liable to be interrupted by those who are interested in supporting wrong,—whether by personal disturbance of the Judge, or by improperly influencing the jury, or by perverting or keeping back evidence, and so hindering and obstructing the course of public justice. Powers must necessarily be vested in the Judges to keep that course free and unimpeded. These are powers of the utmost value and importance, and, duly exercised, virtually render the arm of the law irresistible. Such offences are properly punishable as sinning against the majesty of the law: and I believe no Judge would for a moment allow any personal feeling to influence him in the exercise of the powers and authorities thus reposed in him, and which, as far as my experience goes, have always been exercised for the advancement of justice and the good of the public.

Having given the best attention I am able to all that has been so powerfully urged by Mr. *Bovill* in support of his application, I cannot find the least ground for doubting the propriety of the course taken by the learned Judge on this occasion. And entertaining so clear an opinion upon this subject, I feel it to be my duty to refuse the rule.

WILLES, J.(a)—I am entirely of the same opinion. Several objections have been taken to the warrant under which the applicant is in custody; some go to \*the length, that, under no circumstances, could the commitment have lawfully been made; some are directed only to [\*39 the form of the warrant. I shall first deal with the objection that the commitment for six months is bad, that the commission of the justices of assize is only temporary, and their authority will be superseded by the issuing of a fresh commission, and so the commitment for a time certain an excess of jurisdiction. I apprehend, however, that a commitment for a time certain is a correct, if not the only correct, course. Such a commitment is in effect a sentence upon a summary conviction for an offence against the law (4 Bl. Com. 280); and sentences are not at an end nor prisoners let out of custody by reason of the commission under which they have been convicted expiring, or the justices being superseded. Besides, the statute 1 Ed. 6, c. 7, s. 5, makes the Court a continuous one, though the Judges are changed by the issuing of a fresh commission. Moreover, we know officially that no fresh commission has issued; because we are apprised of that fact when it is about to take place, by receiving a warrant under the Royal sign manual, commanding us to go the circuits in the order which we have previously arranged amongst ourselves.

As to the objection that the witness's refusal to answer was no offence, because it was for the witness, not the Judge, to determine whether the question was one which he was bound to answer,—that is a startling proposition. Every person in the kingdom except the sovereign may be called upon and is bound to give evidence to the best of his knowledge upon any question of fact material and relevant to an issue tried in any of the Queen's Courts, unless he can show some exception in his favour, such, for instance, as that suggested to exist in this case, namely, that to answer might put him in peril of criminal proceedings. Some \*Judges, out of tenderness for the witness, have held it a sufficient [\*40 excuse if he swears that in his opinion,—where such opinion may

(a) The learned Judge handed down this judgment to the reporter, in writing, stating more at large the authorities which he had referred to.

be well founded,—his answering will expose him to such proceeding. Some have thought that too lax and yielding a practice: but there has never been any doubt that it is for the Court to decide whether the circumstances judicially before it are such as to excuse the witness from answering. The law is correctly stated by Mr. Best in his very able and learned work on Evidence, where the authorities are collected, p. 171 of the 3d edition,—“Where the grounds of privilege are before the Court, it is for the Court, and not for the witness or party interrogated, to decide as to their sufficiency.” This warrant states that the question was one which the witness was bound by law to answer; and it is therefore in that respect sufficient. I need only cite 4 Blackstone's Commentaries 281, 283, to show that a witness refusing to be examined commits an offence for which, as being a contempt in the face of the Court, he may be “instantly apprehended and imprisoned at the discretion of the Judges, without any further proof or examination.”

As to the objection to the heading of the warrant,—that it describes no known Court,—it is enough to say that it describes the Court before justices of assize in the same manner as that Court has always been described in writs of nisi prius and records: see 3 Bl. Com. App. X. This is not only a correct description, but the correct style of the Court.

The objection that it does not appear that there was any jury sworn before which the witness was bound to give evidence, fails, because the warrant states that what took place was at the trial of an information for bribery, which trial can only take place before a jury; and it further \*41] states that the witness was sworn and \*examined, which, again, can only be upon a trial before a jury. It is not suggested that in fact there was not a jury; and the warrant, taken as true, shows that there must have been one.

The remaining objection is, no doubt, one of considerable gravity; not by reason of any doubt as to how in point of law it ought to be disposed of, but because of its having been so strenuously urged by a learned counsel of Mr. *Bovill's* position and standing. It is, that all the proceedings and the evidence given in the case, with the question which the witness declined to answer, ought to have been set forth in the warrant, so as to enable this Court, or any single Judge before whom the question may be moved, to decide by way of appeal from and correction of the justice of assize in whose presence and hearing the trial took place, whether in fact the refusal to answer the particular question under the circumstances did amount to an offence in respect of which the witness was liable in point of law to be punished by fine and imprisonment. This objection is founded upon the assertion that the Court held before the justices of assize is an inferior Court, not relatively, but absolutely, in the sense of being a Court of an inferior order, such as a Court of pie-powder, or the sheriff's tourn, to which credit is not to be given for conforming itself to the appointed limits of its jurisdiction, and the proceedings of which must therefore be holden by averments to show that they were beyond all question authorized and regular. That proposition, however, opposed as it is to popular opinion and the understanding of the profession for centuries, when it comes to be examined will prove to be in point of law unsustainable. It is unnecessary to point out the reasons,—for they are part of the history of the

country,—why the justices in eire were necessarily a superior Court (see 1 Maddox Exchequer 150, \*et seq.). It is unquestionable that the justices itinerant who were sent to administer the King's justice in the country, were of the same order as the justices resident near the person of the King. When their commission was "for the hearing of all causes in general," they had the same powers as the justices resident, extending to all causes civil and criminal. Where it was "limited to certain special matters," as it sometimes was (Dugdale, Origines 52 a), the justices were still the King's justices itinerant, and not of an inferior order. [\*42]

The object of the institution of justices itinerant, viz. to prevent the delay and expense of trying country causes before the resident justices, besides the political reason of substituting a general and consistent administration of justice by the Courts of the King for that of local jurisdictions subject to prejudice and fear, was at first but partially effected, by reason of the long interval (seven years) which elapsed between their circuits; so that many civil injuries requiring speedy redress were still left practically without remedy. To provide against this inconvenience, Magna Charta, c. 12, enacted that justices should be sent by the King, or, in his absence, by the chief justicer, once a year at least, to take the assizes of novel disseisin and mort d'ancestor in the several counties in which they arose. This was the origin of the commission of assize in its present form; and, inasmuch as commissions of gaol delivery and oyer and terminer were speedily added (see the form, Dugdale's Origines 53. a.), the justices of assize were almost from the beginning justices itinerant for civil and criminal causes, whose commission was "limited to certain special matters." They were, in common with the other justices of the superior Courts, "without writ, conservators of the peace in all shires of England, and so continue to this day:" Use \*of the Law 10. They had the same criminal jurisdiction as justices in eire; and, with respect to the assizes [\*43] of novel disseisin and mort d'ancestor, they had a share of the jurisdiction previously exercised only by the branches of the supreme Court answering to the Queen's and Common Bench (Fitz. N. B. *Novel Disseisin* 177). Accordingly, they are treated of by Bracton, Lib. 3, cap. 11, as being of the same order as the other justices itinerant, without any suggestion of inferiority. Under Magna Charta, and up to the reign of Ed. 1, we learn from the Second Institute 422, that the justices of assize "were not sometimes but apprentices of the law and a knight associate to them, which oftentimes were favorable;" and the powers of such judges ceased with the particular circuit for which they were appointed. These were two of the mischiefs which led to the passing of the statute of West. 2 (13 Ed. 1), by which two justices sworn, that is, two of the justices in the ordinary service of the King, of whom Lord Coke in the same page observes "what an honourable opinion the law hath of the King's justices sworn, that they are omni exceptione majores," were to be assigned, before whom and one or two of the discreetest knights of the shire whom they were to associate to them, the assizes were to be taken.

After this statute of Westminster, the justices of assize had the same power as the resident justices over matters within their peculiar jurisdiction, and they might either give judgment thereon themselves on

their circuits; or, in case of difficulty, might adjourn either to the Court of Common Bench before the justices there, or, within the equity of the statute authorizing such adjournment, they had the alternative of adjourning before themselves at Westminster. Such adjournments were made to the Exchequer Chamber; and the proceedings of the justices \*44] in such cases \*are reported in the Year Books and elsewhere, in the same manner as proceedings before the other superior Courts. By the same statute, trials at nisi prius at the assizes were instituted; and the justices of assize, by virtue of their commission as such, have ever since had jurisdiction to try, and, where a trial at bar has not been ordered, have tried causes arising in the country, of whatever nature or magnitude they may have been. In cases which they so try, they act in all points touching the trial and its incidents as and for the Court from which the record comes. They may receive pleas puis darrein continuance, which they return to the Court from which the record comes. The postea or record of the proceedings before them stands in the place of the record of the proceedings at bar before the superior Court in which the action is instituted. Such postea is accepted as conclusive, and entered upon the record of the Court in banc; and, in the great majority of instances, the judgment of that Court is pronounced as a matter of course, according to the result of the trial before the Judge of assize.

It has been said that it is a proof of the Court being inferior, that its proceedings may be reviewed by way of motion for new trial; and on that account, at nisi prius, we familiarly speak of the Court above, and of setting the matter right in a higher Court; but in no other sense than relatively, as in this Court we speak of the House of Lords as a superior Court, and as, in the House of Lords, even the Chief Justice of the Queen's Bench, when a peer, may speak of his own Court as an inferior one: see Lord Tenterden's judgment in *Mellish v. Richardson*, 1 Clark & Fin. 224. It must be remembered, moreover, that the present practice as to new trials for reasons not appearing upon the record, is of modern introduction,—so late as the seventeenth century. The regular mode of correcting errors of the Judge at nisi prius is by bill of \*45] \*exceptions, founded on the 31st chapter of West. 2, the construction put upon which furnishes strong proof that the justices of assize were from the beginning considered a superior Court. Although that chapter only mentions the Common Pleas, it has been extended by construction to all Courts superior and inferior, and therefore includes justices of assize: and it is familiar learning, that, upon a bill of exceptions tendered at the assizes or at nisi prius in town, judgment is entered as a matter of course in the Court from which the record comes, according to the opinion expressed at nisi prius, and the exceptions can only be discussed in the Court of error from that Court, in like manner as if they were exceptions to the opinion of the Court in banc upon a trial at bar. Nothing can more clearly show that the proceedings at the assizes were intended to be of the same force and weight as if they had taken place in the original superior Court itself.

By the 14 Ed. 3, c. 16, trial by nisi prius, the importance and utility of which appear to have been then already fully appreciated, was confirmed and improved; and it was enacted that nisi prius from the Queen's Bench might be tried before justices of the Common Pleas, and

vice versâ, or before the Chief Baron of the Exchequer "if he were a man of the law," or before justices of assize, one of whom should be appointed from the justices of either bench or the King's serjeants sworn. At this period, the office of serjeant was one of great dignity (see Dugdale's Origines 110, et seq.), and the Court of Exchequer had not yet taken the high position which it has since acquired as a Court between subject and subject: see 20 Ed. 3, c. 2. The Barons of the Exchequer, therefore, were qualified to be justices of assize only when of the degree of the coif. Indeed, at first, trials at nisi prius appear to have been contemplated only \*in proceedings in the Queen's Bench and Common Pleas; and the trial at nisi prius from the Exchequer [\*46 has a separate history, into which it is unnecessary to enter: see 2 & 3 Vict. c. 22. It was only in the present reign that Queen's counsel and counsel having patents of precedence became qualified to be in the commission of assize: see 13 & 14 Vict. c. 25.

Before the end of Edward the Third's reign, a series of enactments, commencing with Magna Charta, including the Ordinance for Justices, 20 Ed. 3, cc. 1—6, and ending with 42 Ed. 3, c. 11, had conferred upon the justices of assize extensive powers of control over the authorities of the countries through which they passed (see Crompton on Courts 206, et seq.), complete original jurisdiction over all criminal cases (the highest in constitutional importance), exclusive jurisdiction over certain real actions, concurrent jurisdiction with the Courts at Westminster to give judgment in others, and the power of trying at the most important stage all causes of the Courts of Westminster wherein questions were to be tried in the country, which, under the old law of venue, involved almost every disputed matter of fact taking place elsewhere than in London and Middlesex. The statutes which conferred these large powers and extensive jurisdiction before the end of the reign of Ed. 3, are, Magna Charta, c. 12, Westminster 2, c. 30, Statute of the Justices of Assize, 21 Ed. 1, 27 Ed. 1, cc. 3, 4, 12 Ed. 2, cc. 3, 4, 2 Ed. 3, cc. 2, 16, 4 Ed. 3, cc. 2, 11, 12, 5 Ed. 3, c. 14, 14 Ed. 3, stat. 1, c. 16, 9 Ed. 3, stat. 1, cc. 4, 5, 20 Ed. 3, cc. 1—6, and 42 Ed. 3, c. 11.

In reflecting upon the legislation of this period, it will be perceived, that the justices of assize were throughout employed in transacting business which properly belonged to the superior Courts at Westminster, that they were mentioned with the Judges of \*such Courts upon equal [\*47 terms, and that from time to time their jurisdiction and authority became so enlarged that at length the appointment of any other justices in eire became unnecessary. The statute 4 Ed. 3, c. 11, and 20 Ed. 3, cc. 1—6, the Ordinance for the Justices, may serve as instances of the gradual increase of the authority of the justices of assize; and the former contains a significant indication that at that period the appointment of justices in eire or other than the justices of assize was falling into disuse. It seems certain, that, in the reign of Ed. 3, or at the latest in that of Ric. 2, it altogether ceased. Whether that took place because the commission of assize and those which accompanied it conferred all the powers which in practice continued to be exercised by justices in eire, and that so the office of justices of assize and of those in eire became for all practical purposes identical, or whether the former is to be looked upon as a new institution which fulfilled all the purposes of the latter in a more effectual way, and so superseded its use, it seems

needless to inquire. Whether by direct descent or not, certainly, de facto, the justices of assize have succeeded with increased authority in many respects, and improved procedure, to the place of justices in eire. The office of justice of assize is described in Co. Litt. 263 as one of "great authority both in criminal causes and common pleas." In Co. Litt. 293, in speaking of the justices itinerant, Lord Coke says that "they were much like in this respect to the justices of assize at this day, although for authority" (referring to their revenue jurisdiction, which was transferred to the Court of Exchequer) "and manner of proceeding" (viz. as of the Court out of which the record comes, instead of by writ of nisi prius) "far different. And as the power of the justices \*48] of assize by many acts of parliament and other \*commissions increased, so these justices itinerant by little and little vanished away." In like manner Lord Bacon, Use of the Law 13,—*"The judges of assize as they be now become into the place of the antient justices in eire, called justitiiarii itinerantes, which in the previous Kings after the Conquest until Henry Third's time especially, and after in less means even to Richard the Second's time, did execute the justice of the realm."* To the same effect is Dugdale (Origines 53 a), referring to Selden's note to Hengham Magna 243: *"But these justices (in eire) continued not their iters any longer than King Edward the Third's time; for, then those which we call justices of assize served in their stead."* Sir Henry Spelman in his Glossary is very precise upon this point. Under title *"Iter,"* he writes thus:—*"Majoribus nostris idem fuit quod hodie circuitus justiciariorum, designatos sibi comitatus ad justitiam exequendam itinerantium. \* \* \* Erant autem duo justiciariorum itinerantium genera. Alii comitatus itinerabant: alii forestas. Comitatus itinerantes novâ aucti autoritate sub Edouardo Tertio hoc exuerunt nomen, et justitiiarii assisarum sunt exinde nuncupati."* And under title *"Assisa pro Curiâ,"* the same learned writer says: *"Hinc forum quo assisarum prædictarum recognitiones captæ erant, Assisam dicebant (ut patet ex brevi novæ disseisinæ Registro, fol. 196 b) cui nec olim aliud quid negotii ingerebant: nec (pro more) certum anni tempus statuebant, sed pro occasione. Dicti autem sunt ejus judices justitiiarii assisarum, quorum indies ita crevit potestas, ut in ipsis tandem coaluit justiciariorum itinerantium munus, et deliberandæ item gaolæ: auctâque adhuc ipsorum auctoritate statuto anno vigentesimo Edouardi Tertii, capite sexto, assisarum curia maximè jam inde emicuit, cum tamen in eâdem hodiè assisarum Brevia rarissimè proseguuntur. Cele-*

\*49] *bratur autem hæc curia \*per omnem Angliæ comitatum bis in anno, hoc est, in vacatione quadragesimali et in æstivali: itinerantibus ergo per provincias justitiariis (quos vocant) assisarum, et confluente undique insigni nobilium et plebis frequentiâ."* Blackstone, too, 8 Comm. 57, writes: *"These judges of assize came into use in the room of the antient justices in eyre: and, after describing the superior Courts at Westminster, he goes on to speak of the Courts of assize and Nisi Prius as amongst the "courts of general jurisdiction and use which are derived out of and act as collateral auxiliaries to the foregoing."* Mr. Hallam, also, 2 Middle Ages 334, treats of justices of assize as being the ancient justices in eire under a more modern name, and dwells upon the importance of the institution.

The result is, that, historically, the Courts of assize, as being Courts

of general jurisdiction in all criminal cases, and having power to try all issues of fact of whatever importance arising in the several counties on their circuits, to which, therefore, every man is indebted in a greater or less degree for the protection of his property, his liberty, and his life, do stand in the place of the ancient iters of the justices itinerant, and are a superior Court, so to speak, by succession; whilst, practically, regard being had to the powers which they exercise, they are as to criminal matters Courts of the most extensive jurisdiction, and, as to civil causes, periodical sittings of the Judges of the superior Courts, or, in their necessary absence, of others thought worthy to be associated with them for trying in the country those issues of fact which can be more conveniently disposed of there than in London or Middlesex. For this purpose they are as much branches of the superior Courts having all the power which could be exercised by those Courts themselves at the trial, as are the chief or other justices of those Courts sitting at \*Nisi Prius in London or Middlesex: and the case of a Judge at [\*50 Nisi Prius in town furnishes an apt illustration of the power of a justice of assize at the trial of a cause. Long after issues arising in the country were sent by Nisi Prius to be tried at the assizes, and the parties, witnesses, and jurors were thereby spared the labour, delay, and expense of appearing at the bar of the Court in town, Middlesex causes continued to be tried at bar before the full Court, and great delay and obstruction to the business of the Court was thereby occasioned. In order to remedy this inconvenience, the statute of 18 Eliz. c. 12 enabled the Chief Justice or two puisne Judges to sit as justices of Nisi Prius to try issues in Middlesex; and this was the first of the series of statutes by force of which any Judge of the superior Courts at Westminster may now sit in town as a justice of Nisi Prius to try issues in either of those Courts.

Now, can it be suggested that the Chief Justice sitting at Nisi Prius is a Judge of an inferior Court, merely because one puisne Judge or more constituting the Court in banc might grant and make absolute a rule for a new trial in a case tried before the Chief Justice? This reduces the argument for the applicant to an absurdity. There never has been any doubt, there can be none, that the Chief Justice or any other Judge sitting at Nisi Prius possesses for the purpose of the trial all the powers of the Court in banc necessary for the effectual trial of a cause, including, of course, the power to compel witnesses to give evidence, and to deal with them according to law for improperly refusing to do so. The Court held for that purpose is the superior Court itself, sitting usually, but not necessarily, by one of its ordinary members, with a jurisdiction limited for the time "to certain special matters," but with all the powers of a superior Court of record as to such matters and their incidents.

\*This is the true explanation of a technical saying as old as the writ of Nisi Prius itself (see M. 40 E. 3, fo. 38 a), that the [\*51 day at Nisi Prius and the day in banc are in consideration of law the same,—meaning, that the Judge at Nisi Prius is to try the cause instead of the Court in banc, and that what takes place before him with reference to the trial, is of the same effect as if it had taken place in the Court in banc.

So far for the inference to be drawn from the origin, the jurisdiction,

and the procedure of the Courts of Assize and Nisi Prius, which clearly show that they are superior Courts of record; and, if necessary, this result can be fortified by reference to the estimation in which they have ever been held. I do not refer to, and for obvious reasons I shall not dwell upon, the reception which the Judges of assize have always met with from people of every condition in the counties through which they proceed,—a tribute of respect for the administration of the law which, however, for the sake of the community, I hope will never be forfeited or withdrawn. It is certain that the Judges on their circuits have for centuries been received with the highest consideration amongst persons who are properly jealous of their own position, and little likely to tolerate undue assumption in others.

The traditionary rank of the justices of assize, as representing the Crown, no doubt, dates from the time when the circuit of the Judges was substituted for the “sovereign eire of the King” in *propria personâ* (Gilbert C. P. Introduction 20); and the Judges of circuits were members of the *Aula Regis*, that great Court the Chief Justicier of which was *Prorox*, in the absence of the King: Spelman “*Justitia*,” 331: see Gilbert C. P. Introduction 30; 4 Inst. 74. So, in the *Iters*, the writ to the sheriff ran thus:—“*Summone omnes archiepiscopos, episcopos, \*52] abbates, comites, et \*barones, milites, et libere tenentes, et omnes alios de balliviâ tuâ qui coram justitiariis itinerantibus venire solent et debent, quod sint apud, &c., coram justitiariis nostris à die, &c., audituri et facturi præceptum nostrum*” (Dugdale’s *Origines* 52 b). Add to this, that the law gives to the justices of assize during their circuits the aid and control of the high sheriff of each county, as to whom it is laid down, that, “as the keeper of the King’s peace, both by common law and special commission, he is the first man in the county, and superior in rank to any nobleman therein during his office” (1 Bl. Com. 343). The practice in this respect is in accordance with the law: for, “the high sheriffs themselves of every shire are *in person* to attend upon the justices or judges of the assizes and gaol delivery in (and through) their circuits, and shall give their attendance for the due executing of the commandments and processes of the said Judges in matters concerning the execution of their offices and ministration of justice,” &c. (Dalton’s Sheriff 369).

Lord Bacon, in his advice to Sir George Villiers upon the duties of a prime minister, points out the reason for this and like observances, as follows,—II. 10:—“The attendance of the sheriffs of the counties, accompanied with the principal gentlemen, in a comely, not a costly equipage, upon the Judges of assize at their coming to their place of sitting, and at their going out, is not only a civility, but of use also: it raises a reverence to the persons and places of the Judges, who, coming from the King himself on so great an errand, should not be neglected.”

I do not, however, dwell upon these personal respects; but I refer to the series of statutes in which, from *Magna Charta* downwards, justices of assize have been mentioned, and their jurisdiction dealt with as one of the great legal institutions of the country. It would be endless to  
 \*53] refer to all the statutes in which \*they are mentioned, and in none of which are they dealt with as being of inferior jurisdiction.

I shall instance some, to show how special a subject of consideration these justices have been with the legislature.

In the statute of Treason, 25 E. 3, c. 2, the assizes are enumerated with the other great Courts of the kingdom, the Judges of which, when acting as such, it is high treason to kill:—"If a man slay the chancellor, treasurer, or the King's justices of the one bench or the other, justices in eire, justices of assize, and all other justices assigned to hear and determine (oyer and terminer), being in their places doing their offices." Upon which Blackstone (4 Com. 81) remarks,—“These high magistrates, as they represent the King's majesty during the execution of their offices, are therefore for the time equally regarded by the law. But this statute extends only to the actual killing of them, not to wounding or bare attempt to kill them.” The punishment for the latter offence, or for even striking in Court, also shows that the justices of assize are a superior Court; for, at page 125, after discussing the offence of striking in the King's palace, Blackstone proceeds: “But striking in the King's superior Courts of justice in Westminster Hall or at the assizes is made still more penal than even in the King's palace. \* \* \* A stroke or a blow in such a Court of justice, whether blood be drawn or not, or even assaulting a Judge sitting in the Court by drawing a weapon, without any blow struck, is punishable with the loss of the right hand, imprisonment for life, and forfeiture of goods and chattels and of the profits of his (the offender's) lands during life.” Practically, in such a case, the Judge would now treat such misconduct as a contempt of Court, and punish it upon the spot, as the offence in this case was punished, by fine and imprisonment. But the existence of such a penalty is a \*proof that the Court is a superior Court. See also 3 Inst. [\*54 140. I may here observe that the justices of oyer and terminer mentioned in the statute of Treason after justices of assize, do not include such functionaries as justices at quarter sessions, although the words to hear and determine be in their commission, but only such justices of oyer and terminer as “have their commission ad audiendum et terminandum as the principal designation of their office” (1 Hale, P. C. 231). The justices intended by this designation generally are “justices of assize or other justices who have a *special* commission of oyer and terminer par excellentiam” (Vin. Abr. *Justices of Oyer and Terminer* 2). Of such Courts of Oyer and Terminer the Judges only sought to be of the quorum (2 Ed. 3, c. 2; 4 Bl. Com. 267); and of these the Queen's Bench is the chief, as it was also the highest eire (see Vin. Abr. *ubi suprâ*; 4 Inst. 103). All the Queen's subjects great and small are bound to attend and assist the Judges acting under that commission.

The next statute is that of 20 R. 2, c. 3, which, whether it was intended for the independence or the dignity of the justices of assize, equally shows the importance which continued to be attributed to them by the legislature:—"The King doth will and forbid that no lord or other of the country little nor great shall sit upon the bench with the justices to take assizes in their sessions in the counties of England, upon great forfeiture to the King; and hath charged his said justices that they shall not suffer the contrary to be done."

The same conclusion as to the estimation in which justices of assize were held may be drawn from the form of the commission of justices

of the peace, founded upon 34 E. 3, c. 1, which ran, that, "in a case of difficulty," judgment should not be given "unless in the presence of  
\*55] one of our justices of one or other bench, \*or of one of our justices appointed to hold the assizes in the aforesaid county" (see Lambard's Eirenarcha 38).

The last statute which I need mention, is, the 13 & 14 Car. 2, c. 21, being the statute which before this reign (see now 22 & 23 Vict. c. 32, s. 18) regulated the attendance with which sheriffs are bound to receive the justices of assize. It should seem, that, after the restoration, the loyalty of the sheriffs had led them into extraordinary expenses in receiving the Judges, which expenses that statute made illegal for the future; but, at the same time, it provided, as to the attendance of the sheriff at the assizes, that "no sheriff shall have more than forty men servants with liveries attending upon him in the time of the said assizes, nor under the number of twenty men servants in any county whatsoever within the kingdom of England, nor under the number of twelve men servants in any county within the dominion of Wales." This is but a slight, and of itself unimportant matter; yet, taken with the personal attendance of the high sheriff already referred to, it suggests a ceremonial quite out of character with the reception of any but a superior Court.

It thus appears to me very clearly, whether I consider the origin, the history, the procedure, or the jurisdiction of the Court of Assize, or the estimation in which it has ever been held, that I must class it as a superior Court of a high order. Mr. *Bovill* has not cited a single authority or even hint to the contrary. And, even supposing that he was right in his construction of the passage from Bacon's Abridgment, title *Courts*, and that Judges of assize are not to be classed with the *justitii itinerantes*, but between them and the Courts of the county palatine, these latter are still by the same authority superior Courts. Originally belonging as they did to lords palatine, to whom the Crown had granted  
\*56] their counties, to hold to \*them and their heirs "*ita libere ad gladium sicut ipse Rex tenebat Angliam ad Coronam*," and who possessed *jura regalia* there, including, until 27 H. 8, c. 24, the power of making justices in eire and justices of assize, the Courts of such counties palatine, though subject,—as was the Common Pleas within living memory,—to the control of the King's Bench by writ of error, were not inferior Courts, so as to require that their jurisdiction and authority should be specially set forth in their proceedings, or in justifying under them. They belonged to that superior class to which credit is given by other Courts for acting within their jurisdiction, and to whose proceedings the presumption *omnia rite esse acta* applies equally as to those of the supreme Court of Parliament itself. Lord Chief Baron Gilbert lays down that "these were superior Courts within their jurisdiction in as ample a manner as a Court of Westminster." (Gilbert C. P. 190). To the same effect was the opinion of Lord Wensleydale, delivering the judgment of the Court of Exchequer Chamber in the great case of *Howard v. Gossett*, 10 Q. B. 411, 447 (E. C. L. R. vol. 59). The warrant in this case is more precise than either of those which were held valid there, and in the case of *The Sheriff of Middlesex*, 11 Ad. & E. 273 (E. C. L. R. vol. 39). In any point of view, therefore, this is a valid warrant, and the applicant is lawfully in custody.

We have been urged to be careful of being misled by our own way

of thinking, in the decision of this case, because, as it was suggested, our privileges are involved in the question. As that course has been adopted, I take leave to say that I am not conscious of the vulgar desire to elevate myself or the Court of which I may be a member, by grasping after a pre-eminence which does not belong to me; and that I will endeavour to be even valiant in preserving and handing down those powers to do justice and to maintain \*truth, which, for the com- [\*57 mon good, the law has intrusted to the Judges.

I think the case, however important it may be, admits of no doubt, and that the habeas corpus asked for ought not to issue.

BYLES, J.—The learning and research of my Lord and my Brother Willes have left me no authorities to cite, and very little to say. Under ordinary circumstances, I should not have felt justified in adding a word. But, this being a great constitutional question, I think each member of the Court ought to state the reasons for his judgment.

The power of commitment for contempt is indispensable to the administration of public justice; and the knowledge that it is indispensable renders its exercise generally unnecessary. Its exercise, therefore, is rare; and, as to its abuse, I am not aware that a single instance of its abuse by a Judge of assize during the course of many centuries has been brought to the notice of the Court. Certainly the instance under consideration is no abuse of the power; for, here, it has been exercised to prevent a scandalous failure of public justice. Should hereafter a case of abuse arise, it by no means follows from our judgments that in such a case the facts might not be examinable, and relief afforded, on affidavit.

The only substantial objection taken in the present instance is to the form of the warrant. It is alleged that a Judge of assize cannot commit for contempt in general terms.

It is plain, upon the authorities, and is admitted, that a *superior Court* may commit for contempt of Court in terms much more general than the language of this warrant. That power has been decided to belong not only to the High Court of Parliament, that is, to the House of Lords and to the House of Commons, but also \*to the Courts [\*58 of Queen's Bench, Common Pleas, and Exchequer, and to all superior Courts of record. The main question, therefore, is, whether a Court of Assize be one of the superior Courts of record.

From Magna Charta down to very recent times, the distribution of public justice to the inhabitants of every part of England has been effected, neither on the one hand by bringing the suitors to Westminster, nor on the other by the establishment of inferior and local jurisdictions; but by periodically despatching the Judges to administer justice, in the name of the sovereign, among the people in every county. This institution is older than even the Courts of Westminster themselves; for, the justices in eire, as is well known, proceeded from the Aula Regia before it was divided into what are now the superior Courts of law. The justices in eire were the predecessors of the present Judges of assize, who have inherited their power and dignity. The commission of assize alone, though only one of the commissions under which Judges of assize sit, has for centuries conferred on the present Judges of assize powers quite as ample and in some respects more ample than those with which justices in eire were invested. The jurisdiction of Judges of assize

extends to all legal property of every kind, without distinction and without limit. An appeal for error in law was given, not by the common law, but by statute; and, even then, neither to the Court from which the Judge might have come nor to the Court from which the record might have come, but to a Court of error. The practice of granting new trials is of modern introduction. In addition to this unlimited civil jurisdiction, the Judges of assize have, and always have had, by the express terms of their commission, unlimited power as a Court of criminal judicature. They take cognisance of crimes of every degree, \*59] from high treason down to \*petty offences, and have for centuries disposed, and do to this day dispose of the lives of the Queen's subjects; and that without appeal. Lest the judges of the superior Courts should not be sufficient in number to execute these responsible duties, for many ages, and by force of several statutes, the most eminent practitioners of the law, and especially the practitioners in this Court of Common Pleas, who from the ancient exclusive jurisdiction of this Court in real actions were deemed best qualified to assist in the trial of writs of right and writs of entry, were not only associated with the Judges of assize, but introduced into the quorum clause, and sat as Judges. By these means, before Courts of equity had engrossed the exclusive attention of many members of the bar, the whole body of eminent lawyers was engaged in periodically distributing justice through the land. The Crown has by a late statute (a) been also empowered to call to its assistance in all cases that branch of the profession which is its most distinguished ornament, and of which the learned counsel who has moved for this rule is himself a member. To call a Court so constituted, and of jurisdiction so transcendent, an inferior Court, seems to need some authority: and so the learned counsel appeared to think.

The only authority cited for this purpose is to be found in a passage in Bacon's Abridgment, *Courts* (D), taken from Sir Matthew Hale. We learn that this passage was at first cited to the Court of Exchequer as an authority for the position that a Court of assize was an inferior Court. But it is plain, and is now admitted here, that, on the contrary, it is an authority that the Courts of assize are superior Courts: but still it is contended that the passage shows that the Courts of justices \*60] of assize are among the superior Courts called the \*less principal Courts. Even that is not so; for the expression *justices itinerant ad communia placita* comprehends, as my Brother Willes has shown, justices of assize.

On the one hand, I abstain from giving any opinion that it is essential for a Judge of a superior Court of record committing for a contempt in the face of the Court to make out any warrant at all, and that a parol commitment *sedente curiâ* is not all that is requisite. On the other hand, if a warrant be made out stating the facts, as in *Bushell's Case*, Vaughan 135, and showing on the face of it that the alleged contempt was no contempt in point of law, that warrant would no doubt be bad.

This warrant (which it is to be remarked is not the warrant of a single Judge, but of the Court of assize) not only finds a contempt, but explains the nature of the contempt; for, it adjudges that the witness committed the contempt by refusing, on the trial of a criminal information, to

(a) 13 & 14 Vict. c. 35.

answer a question which he was bound by law to answer, and which therefore must have been relevant, material, and harmless. I am by no means prepared to decide, even if the law were as the learned counsel contends, that this warrant is not perfectly good: otherwise, a warrant must be drawn with a very inconvenient degree of length and certainty.

KEATING, J., having been one of the Judges of assize concurring in the commitment of Mr. Fernandez, retired from the argument.

Rule refused.(a)

(a) At the following Summer Assizes, the information against Mr. Charlesworth again came on for trial, when Fernandez attended and gave his evidence. Charlesworth was convicted, and Fernandez was shortly afterwards released from custody by order of the Secretary of State.

### \*BAGGALAY v. BORTHWICK. April 16. [\*61

A reference under the Common Law Procedure Act, 1854, confers upon the master the same powers and imposes upon the parties the same liabilities as in the case of a reference under an ordinary submission or rule or order.

Therefore the Court will not remit the matter to the master for reconsideration, except where there is ground for setting aside his certificate.

Nor will they, where the master has declined to state a case for the opinion of the Court under s. 5, remit the matter to him, in order to give one of the parties an opportunity of applying to the Court to direct a case to be stated under s. 4.

THIS was an action upon a building contract referred to one of the masters under the 3d section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125. The charges were proved to be reasonable, but there was no proof that the architect had certified that the work had been done to his satisfaction, as provided by the contract. It was thereupon objected on the part of the defendant, upon the authority of *Scott v. The Corporation of Liverpool*, 1 Giff. 216,—where Erle, C. J., says: “By the contract, it appears to me that the engineer is interposed between the corporation and the contractors, and made the absolute judge of the performance of the works, and that there is no right in the contractors to demand payment, and no liability on the corporation to pay throughout the contract, unless the condition of obtaining a valuation by the engineer, and his certificate, has been fulfilled,”—that the plaintiff was not entitled to recover; and the master was requested to state a case for the opinion of the Court. The master, however, without expressing any opinion upon the point thus raised, gave his certificate in favour of the plaintiff.

Gates, for the defendant, now moved for a rule to show cause why the matter should not be referred back to the master.—The 5th section of the Common Law Procedure Act, 1854, provides that it shall be lawful for the arbitrator upon any compulsory reference under this Act, or upon any reference by consent of parties where the submission is or may be made a rule or order of any of the superior Courts of law or equity at Westminster, if he shall think fit, and if it is \*not [\*62 provided to the contrary, to state his award, as to the whole or any part thereof, in the form of a special case for the opinion of the Court; and when an action is referred, judgment, if so ordered, may be entered according to the opinion of the Court.” [BYLES, J.—It has

been more than once held that we cannot send back an award except there be ground for setting it aside. Is a reference under the statute different in this respect from any other reference?] The object of the motion is that the matter may be sent back, in order that the defendant may avail himself of the 4th section, which enacts, that, "if it shall appear to the Court or a Judge that the allowance or disallowance of any particular item or items in such account depends upon a question of law fit to be decided by the Court, or upon a question of fact fit to be decided by a jury, or by a Judge upon the consent of both parties as thereinbefore (s. 1) provided, it shall be lawful for such Court or Judge to direct a case to be stated, or an issue or issues to be tried; and the decision of the Court upon such case, and the finding of the jury or Judge upon such issue or issues, shall be taken and acted upon by the arbitrator as conclusive." [WILLES, J.—You are in effect moving to set aside the award. It was held by the Exchequer in *Hogge v. Burgess*, 3 Hurlst. & N. 293,† and by two cases in this Court(a) that the rules of law as to setting aside awards under ordinary references apply to compulsory references under the Common Law Procedure Act, 1854, and that the 8th section(b) of that Act only enables the \*63] \*Court to remit the matters referred to the arbitrator in cases where they would otherwise set aside the award. Martin, B., in that case, referring to s. 8, says: "It seems to me that that is nothing more than enacting that the clause introduced by Mr. Richards shall apply to all orders of reference made under the 3d section, and that it does not alter the distinct enactment of the 7th section."(c)] In *Hogge v. Burgess*, the master expressed an opinion upon the point raised before him; and the parties came too late. Here, the master came to no decision, so that the defendant might apply to the Court or a Judge under s. 4.

ERLE, C. J.—I am of opinion that there should be no rule in this case. This was a compulsory reference under the 3d section of the Common Law Procedure Act, 1854. Now, it has been laid down by this Court and by the Court of Exchequer, that a reference under this Act confers upon the arbitrator the same powers and imposes upon the parties the same liabilities as in the case of an ordinary arbitration where the arbitrator is selected by the parties themselves. And the \*64] rule may be a very salutary one. The arbitrator \*whether named by the Court or chosen by the parties is intended to be the forum before which the differences between the parties are to be finally adjusted: the parties are bound by the arbitrator's decision as well in law as in fact. The 5th section contemplates that cases may arise in which the arbitrator in the exercise of his discretion may see fit to take

(a) See *Munday v. Bluck*, antè, p. 557, and *Holloway v. Francis*, antè p. 559.

(b) Which enacts, that, "in any case where reference shall be made to arbitration as aforesaid, the Court or a Judge shall have power at any time and from time to time to remit the matters referred, or any or either of them, to the reconsideration and redetermination of the said arbitrator, upon such terms as to costs and otherwise as to the said Court or Judge may seem proper."

(c) Which enacts that "the proceedings upon any such arbitration as aforesaid shall, except otherwise directed hereby or by the submission or document authorizing the reference, be conducted in like manner and subject to the same rules and enactments, as to the power of the arbitrator and of the Court, the attendance of witnesses, the production of documents, enforcing or setting aside the award, and otherwise, as upon a reference made by consent under a rule of Court or Judge's order."

the opinion of the Court upon a question of law. A question of law was raised in this case, and the arbitrator (the master) did not think fit to state a case for the opinion of the Court. Then, Mr. *Gates's* motion is founded upon the 4th section of the statute, which enacts, that, "if it shall appear to the Court or a Judge that the allowance or disallowance of any particular item or items in the account depends upon a question of law fit to be decided by the Court, or upon a question of fact fit to be decided by a jury, or by a Judge upon the consent of both parties as thereinbefore provided, it shall be lawful for such Court or Judge to direct a case to be stated, or an issue or issues to be tried; and the decision of the Court upon such case, and the finding of the jury or Judge upon such issue or issues, shall be taken and acted upon by the arbitrator as conclusive." It is contended, that, when before the arbitrator, the parties have a right to demand *ex debito justitiæ* a case to be stated or an issue directed. I do not, however, think the clause goes that length. It may be that a party may have a right, when a question of law arises during the arbitration, to come to the Court or a Judge for an interim order for that purpose. I have never known the power to be exercised. It is entirely new to me. But, when the question is properly brought before the Court, and the circumstances disclosed are fitting, it is possible the power may be exercised. Mr. *Gates* certainly has not \*entitled himself to raise the point here, and [\*65 therefore his application must be rejected.

The rest of the Court concurring,

Rule refused.(a)

(a) See *Holland v. Judd*, 3 C. B. N. S. 826 (E. C. L. R. vol. 91).

## HARE v. EDWIN HENTY and GEORGE HENTY. May 7.

A country banker receiving from a customer a check for presentment drawn upon another country banker not resident in the same town, is not bound to transmit it for presentment by the post of the day on which he receives it, but has until post-time of the next day for so doing. A., a banker at Worthing, received from B., a customer, a check drawn upon C., a banker at Lewes (which is distant about eighteen miles from Worthing), on the morning of *Friday, the 8th of July*, and sent it *that evening* by post to his London correspondent, D., for presentment through the "country clearing-house," then recently established, but in pretty general use among country bankers. D.'s clerk handed the check at the clearing-house on the morning of *Saturday, the 9th*, to the clerk of E., the London correspondent of C. (the drawee), who sent it down by the post of *that evening* to C.:—Held, that the presentment was in due time.

THIS was an action brought against the defendants, who were bankers at Worthing, in Sussex, by a customer, for alleged negligence in omitting to present in due time a check drawn upon a bank at Lewes, in the same county, whereby the customer sustained a loss.

The first count of the declaration stated, that the defendants theretofore, and at the time of the committing of the grievances thereafter mentioned, were bankers carrying on their business in the country, to wit, at Worthing, in the county of Sussex, and as such bankers were used and accustomed, in the way of their trade and business, among other things, to receive and take into their charge from their customers checks drawn by other and different persons upon other and different

bankers, and to present such checks for payment to the bankers upon whom they might be respectively drawn, and by the custom and usage of \*trade persons carrying on the business of banking in the \*66] country had been used and accustomed and were bound to transmit such of the checks so received by them from their customers as were drawn upon other bankers in the country carrying on business in different places directly to the bankers upon whom they were respectively drawn, by the evening post of the day on which the checks were so received, provided that a reasonable time had elapsed for so doing after the checks had been so received from their customers as aforesaid: That the plaintiff, long before and at the time of committing the grievances thereafter complained of, was a customer of and dealt with the defendants in the way of their trade and business of bankers; and that, on the 8th of July, 1859, he the plaintiff paid to the defendants in the way of their trade and business of bankers, and the defendants as such bankers as aforesaid then received from the plaintiff a certain check dated the 7th of July, 1859, drawn by certain persons trading under the style and firm of John Kidd & Son, directed to Messrs. Whitfield, Molyneux & Whitfield, bankers, Lewes, requiring such last-mentioned persons to pay to the bearer 245*l.* 14*s.* 6*d.*, of which check the plaintiff had become the bearer: That all times had elapsed and all things happened necessary to entitle the plaintiff to have the said check transmitted by the defendants by the evening post on the said 8th of July directly to Messrs. Whitfield, Molyneux & Whitfield, at Lewes, for payment; and it thereupon then became and was the duty of the defendants so to transmit the said check for payment as aforesaid: Yet the defendants disregarded their duty, and wholly neglected and omitted to send the said check by the evening post on the said 8th of July directly to Messrs. Whitfield, Molyneux & Whitfield, at Lewes: and by the \*67] defendants' negligence and improper conduct the \*said check was presented to Messrs. Whitfield, Molyneux & Whitfield at Lewes, for payment, long afterwards, and much later than it otherwise would and ought to have been; whereby and by means of the premises the plaintiff had lost and been deprived of the sum of 245*l.* 14*s.* 6*d.*, and interest upon the same from the said 8th of July, 1859.

The second count stated, that the defendants were bankers at Worthing, in the county aforesaid, and the plaintiff was a customer of and dealt with the defendants in the way of their business as bankers; that the plaintiff, as such customer as aforesaid, and in the way of business, on the 8th of July, 1859, paid into the defendants' bank for collection, and the defendants then received from the plaintiff for the purpose aforesaid, a certain check dated July the 7th, 1859, drawn by John Kidd & Son upon Messrs. Whitfield, Molyneux & Whitfield, bankers, Lewes, requiring the said last-mentioned persons to pay to the bearer 245*l.* 14*s.* 6*d.*, of which check the plaintiff had become the bearer; and it thereupon then became and was the duty of the defendants to present the said check to Messrs. Whitfield, Molyneux & Whitfield, at Lewes, for payment, within a reasonable time and according to the custom and usage of merchants and bankers: Yet the defendants disregarded their duty, and wholly neglected and omitted to present the said check to Messrs. Whitfield, Molyneux & Whitfield, at Lewes, for payment, within a reasonable time, or according to the custom and usage of mer-

chants and bankers; and by the defendants' negligence and improper conduct the said check was presented to Messrs. Whitfield, Molyneux & Whitfield, at Lewes, for payment, after the lapse of a most unreasonable time, and much later than it ought and should have been presented, according to the custom and usage of merchants and bankers: whereby and by \*means of the premises the plaintiff had lost and been [\*68 deprived of 245*l.* 14*s.* 6*d.*, and interest upon the same from the said 8th of July, 1859.

There was also a count for money received by the defendants to the plaintiff's use, for money lent, interest, and money found due upon accounts stated.

The defendants pleaded,—first, to the first and second counts, not guilty.

Secondly, to the first count, that they the defendants as such bankers were not used and accustomed in the way of their trade and business to receive and take into their charge, from their customers, checks drawn by other and different persons upon other and different bankers, and to present such checks for payment to the bankers upon whom they might be drawn, as alleged.

Thirdly, to the first count, that, by the custom and usage of trade, persons carrying on the business of banking in the country had not been used and accustomed, nor were they bound, to transmit such checks as were received by them from their customers, and were drawn upon other bankers in the country, carrying on business in different places, directly to the bankers upon whom they were drawn, by the evening post of the day on which the checks were so received, in manner and form as in the first count alleged.

Fourthly, to the first count, that the plaintiff did not pay to the defendants, nor did the defendants receive from the plaintiff, the said check in that count mentioned, to be transmitted according to the said custom and usage in the first count mentioned.

Fifthly, to the second count, that the plaintiff did not pay into the defendants' bank, nor did the defendants receive for collection, the said check in the second count mentioned, as alleged.

Sixthly, to the residue of the declaration, never indebted. Issue thereon.

\*The cause was tried before Blackburn, J., at the last Summer Assizes at Lewes. The facts which appeared in evidence were as [\*69 follows:—On the 7th of July, 1859, the plaintiff received at Brighton, between 4 and 5 o'clock in the afternoon, an open check on the bank of Messrs. Whitfield, Molyneux & Whitfield, at Lewes, for 245*l.* 14*s.* 6*d.*, drawn by Messrs. Kidd & Son, who kept an account there, payable to one Ingram, or bearer. Shortly after 10 o'clock on the morning of the 8th, the plaintiff paid in this check with others to his account with Messrs. Henty, his bankers, at Worthing, which is about eighteen miles distant from Lewes. The post from Worthing to Lewes closes at 9 P. M., and the letters are delivered between 7 and 8 o'clock the following morning. If the check in question had been sent direct by Messrs. Henty to Lewes by the post of the day on which they received it, it would have arrived there on the morning of Saturday, the 9th, when it would have been paid. In consequence, however, of the course which was adopted, it did not reach Lewes until the morning of Monday, the

11th, when it was dishonoured; Kidd & Son having suspended payment on that day.

Messrs. Henty, the defendants, having received the check on the morning of Friday, the 8th of July, sent it by that evening's post to Messrs. Lubbock & Co., their London correspondents, for presentment to Messrs. Williams, Deacon & Co., the London correspondents of Messrs. Whitfield & Co. (whose names were printed on the check), through the "country clearing-house,"—a practice which had obtained almost universally since the Autumn of 1858, in imitation of the London clearing-house. Lubbock & Co.'s clerk took the check to the country clearing-house on the morning of Saturday, the 9th, and handed it to Williams, Deacon & Co.'s clearing-house clerk, who sent it \*70] down by that night's post to Messrs. Whitfield & Co., at Lewes, where it arrived on the morning of Sunday, the 10th: and on Tuesday, the 12th, it was returned to the plaintiff dishonoured.

The evidence as to the practice of country bankers with respect to the presentment of checks before the establishment of the country clearing-house was extremely loose: but the result seemed to be that a country banker receiving from a customer a check on another country banker sent it to the latter by the post of that *or the next* day, as suited his own convenience.

Mr. George Whitfield, a member of the firm of Whitfield, Molyneux & Whitfield, who was called as a witness for the plaintiff, said: "Before the country clearing-house was established, we sent checks *on the day we received them*: we never kept them over night. That was our invariable practice. *I believe other banks have kept them over night.* In the case of bills, we do keep them over night."

Mr. Hall, manager of the Union Bank, Brighton (who was also called for the plaintiff), said: "If a check on the Lewes bank, or on Henty's bank, is received by us, we send it direct to these two banks *the same night* when received. If the check is on any other bank, then we send it to London, to the country clearing-house. That practice has existed since the establishment of the clearing-house, in November, 1858. Before that, checks on all banks were sent to them direct *on the day we received them, unless there was a special reason.* The sooner sent the sooner they are honoured."

Mr. Cockburn, manager of the Brighton Branch of the London and County Bank, also a witness for the plaintiff, said: "A country check is sent by us direct to the bank on which it is drawn, *on the evening of* \*71] *the day we receive it*; that is, if the bank is on this side of London. I believe it to be the custom of banks always to send off checks the night they get them. I believe they claim the *right* to keep them until *the next day*, but do not. It is our business to get rid of them. *The ordinary course of practice is to get rid of them the same night.*"

The following witnesses were called on the part of the defendants:—

William Drake, a clerk in Jones, Lloyd & Co.'s house, having the general management,—“The country clearing-house was established in 1858. Prior to that, if a country check was paid by a customer to our London house, the custom was, to send it by the post of *the following day*. I cannot speak as to the usage if London checks were paid to country banks. There are some London bankers who do not use the

clearing-house. *We present checks on the morning after we receive them.* That has been the usage as long as I have known. The country clearing-house is now, as far as I can judge from the checks passing through us, generally used. We never forwarded country checks on the day they were paid in, unless we had special orders, before the clearing-house was established. The London post leaves at 6."

Mr. Bellingham, a member of the firm of Curtis, Pomfret & Co., bankers at Rye:—"We have generally used the country clearing-house since its establishment. For that purpose, we send checks off on the evening of the day we receive them. Before the establishment of the clearing-house, we occasionally retained checks until the next day, especially on market-days, when they are most numerous. We should before the clearing-house have sent off checks to the westward the same day; but the eastward post, being at 6, was too early. One on Lewes we should \*have sent off the same day. We frequently, from [\*72 pressure of business, on market-days, detained checks to the westward as well as eastward."

John Henry Turner, clerk to Randall & Co., bankers, Maidstone:—"Our house now uses the country clearing-house. Before that was established, we generally sent off all the checks received before 3 o'clock: as to those received later, we used our discretion, and frequently kept some. If a single check for a small amount was paid in in the morning, we should probably retain it. If a large amount, we should probably forward it, as affecting the money balance. *We always claimed the right to retain it. Our habit was to forward; but there were many exceptions. We kept them back as a matter of right.*"

Mr. Head, banker, East Grinstead:—"Before the country clearing-house was established, *we usually sent checks on the day we received them: that was the usual custom; not invariable by any means.* It was a question of time. The post went at 6, and the bank closed at  $\frac{1}{2}$  past 5. It was a matter of convenience. We now send them to London. We forwarded them the same day, as a matter of business, to get the money as soon as possible."

Charles Austwick, managing clerk to Knight, banker, Farnham:—"We use the country clearing-house. Since it has been established, we send up checks on the evening of the day on which we receive them. Before that, *we occasionally retained them till the following day.* It was the practice to send checks paid in early. If it was a small check, and we thought it probable we might have another on the same banker, we would retain it."

Mr. John Lubbock, member of the firm of Lubbock & Co., London:—"I remember the establishment of the country clearing-house. The custom in London before \*that, was, to keep checks on country [\*73 bankers a day, unless paid in very early, or there were special circumstances. We always did it as a matter of right. I never heard it doubted." On cross-examination, this witness said: "I cannot speak as to country bankers' custom. We sometimes forwarded those that came in before 12, but not as a general rule. We should not forward those later, unless under special circumstances. More than five-sixths of the country bankers use the clearing-house."

Mr. Down, many years clerk at Williams, Deacon & Co.'s:—"Before the country clearing-house existed, we transmitted checks *by the*

*following night's post.* The name of the London agent is printed on the checks since the clearing-house. I know only of the London custom: but I am not aware of any difference between it and the country practice."

Edwin Henty, one of the defendants:—"The plaintiff banked with us. He paid in the check in question on the 8th of July. By the same day's post we sent it to London. That has been the course ever since the establishment of the country clearing-house. Before that, we generally sent checks by the first post. *We sometimes kept them till the following day, if it was a matter of convenience to ourselves. We chose to take the risk on ourselves.* We almost invariably sent them on the same day. I infer from what I know of other bankers that they did nearly the same as we did."

On the part of the defendants it was contended that country bankers receiving checks from their customers are not bound by law to forward them for presentment on the day on which they are paid in, but may retain them until the next day's post,—referring to Byles on Bills, 7th edit. 18, where it is laid down, upon the authority of *Rickford v. Ridge*, 2 Campb. 537, and *Bond v. Warden*, 1 Collyer 583, that, if the party \*74] receiving the check from the drawer do not live in the same place with the drawee, he should send it to his banker or other agent *by the next day's post*, and they should present it *on the day after they received it.*"

The learned Judge left two questions to the jury,—first, whether the check, if presented on Saturday, would have been honoured,—secondly, what, before the country clearing-house was established, was the general usage of country bankers as to the time within which they were to forward checks on other country bankers, when paid in by their customers. And he told them, that, if the bankers have till the evening of the next day, it was quite consistent with their having generally forwarded earlier for their own convenience, but that, if they only had till the post of the first day, it would be a violation of the usage if they kept any checks back, and that the time which each holder has to forward his check, is, by the post of next day (founded, no doubt, on the difficulty of getting all transactions finished before the post-time of the day); but that, for the purpose of the day, this did not decide the question as between banker and customer, though it was a weighty argument in favour of the defendants.

The jury found, that the check, if presented on the Saturday, would have been paid; and that the custom of country bankers in general, was, to forward checks *on the day received.*

The learned Judge thereupon directed a verdict to be entered for the plaintiff for the amount claimed, reserving leave to the defendants to move on the law as to the time of forwarding the check.

*Shee*, Serjt., in Michaelmas Term last, accordingly obtained a rule nisi to enter a verdict for the defendants, or for a new trial, on the ground "that the learned Judge misdirected the jury in leaving to them \*75] a question of usage, and in not telling them as a matter of law that the check was presented in due time," and also on the ground that the verdict was against evidence. He submitted that the check was presented within the same time, within which the defendants were bound to present it if they had not sent it through the country clearing-

house in London, viz., by the post of the day succeeding that on which they received it: and he referred to Byles on Bills, p. 17, where the learned author says,—“We have already observed that checks are in legal effect inland bills of exchange, payable to bearer on demand; and we shall hereafter see that an ordinary bill of exchange, payable on demand, must be presented for payment, or, if the parties live at a distance, forwarded for presentment within a reasonable time, which is generally held to comprehend the day after it is issued. Such also is the general rule as to the presentment of checks, when the question of due presentment arises between the holder and a transferrer not being the drawer. ‘The result of the cases,’ says Tindal, C. J., in *Moule v. Brown*, 4 N. C. 268 (E. C. L. R. vol. 33), 5 Scott 694, ‘from *Rickford v. Ridge*, 2 Campb. 537, to *Boddington v. Schlencker*, 4 B. & Ad. 752 (E. C. L. R. vol. 24), 1 N. & M. 540 (E. C. L. R. vol. 28), is that the party receiving a check has till the following day to present it, where there are the ordinary means of doing so.’ Formerly it was held that the check must be presented on the *morning* of the next day; it is now, however, firmly established that the holder has the whole of the banking-hours of the next day within which to present it:” *Robson v. Bennett*, 2 Taunt. 388; *Rickford v. Ridge*, 2 Campb. 537.

*Edwin James*, Q. C., *Hawkins*, Q. C., and *Gates*, showed cause.—It was the duty of the defendants to \*forward the check for presentment by the cross-post to Lewes on the day they received it, viz., [\*76 Friday, the 8th of July. Instead of adopting that obviously proper course, they crossed the check with the names of their London correspondents, Lubbock & Co., and sent it to them by the Friday night’s post, to pass through the country clearing-house on the following morning. The consequence of which was, that the check was not presented at Whitfield & Co.’s at Lewes until the morning of Monday the 11th, when it was refused payment. At the country clearing-house,—which is a thing of quite recent introduction,—no credit is given: it is used as a mere medium for the presentment of checks to the drawees. [WILLES, J.—It is unlike the practice of the London clearing-house in this respect.] The defendants’ duty, as was clearly established by the evidence of Mr. Henty himself,—they having received the check early on the morning of the 8th of July,—was, to forward it on the evening of the same day, not to London, but to Lewes. By the usage of the city of London, a person receiving a check with his banker’s name written across it, pays it in at the banker’s, and the banker, if he receives it in time, presents it at the clearing-house, and obtains payment the same day. In *Boddington v. Schlencker*, 4 B. & Ad. 752 (E. C. L. R. vol. 24), a debtor paid his creditor a crossed check, and the latter on the same day transmitted it to his banker. The banker negligently (as was alleged) omitted to present it at the clearing-house in time for that day (when it would have been paid), and on the next it was dishonoured, the firm on which it was drawn having stopped payment: it was held that the supposed negligence of the banker, *though it might render him liable to his customer*, did not discharge the drawer: the holder of the check being entitled, by the general law, to present it the day after he receives it; and no custom of the \*city being proved, as between debtor and creditor, that a crossed check, if received by the latter and [\*77 sent by him to his banker in sufficient time, must be cleared the same

day. The plaintiff, when he paid in the check to his bankers, had a right to expect that it would be presented according to the usual course, and not by the circuitous mode of sending it to the clearing-house in London,—a practice of which he could know nothing. [ERLE, C. J.—If the defendants had a right to retain the check until the day after that on which they received it, and had exercised that right, it would not have reached the Lewes bank before the Monday.] “When the defendants received the check from their customer, they became his agents to receive the money upon it *as early as possible*.” per Abbott, C. J., in *Kilsby v. Williams*, 5 B. & Ald. 815, 819 (E. C. L. R. vol. 7), 1 D. & R. 476 (E. C. L. R. vol. 16). The bankers are not *holders* of the check: they are merely agents for its presentation: *Boyd v. Emerson*, 2 Ad. & E. 184 (E. C. L. R. vol. 29), 4 N. & M. 99 (E. C. L. R. vol. 30). [WILLIAMS, J.—How would the check have been paid if it had been sent by the defendants by the cross-post to Lewes on the Saturday?] It would have been so dealt with by Messrs. Whitfield & Co. as to bind them to the payment of it. [WILLES, J.—A man who employs a banker is bound by the usage of bankers. Was it usual for country bankers at the time in question to use the country clearing-house? The evidence was that at the time of the trial about five-sixths of the country bankers used it.] In *Alexander v. Burchfield*, 3 Scott N. R. 555 (E. C. L. R. vol. 36), 7 M. & G. 1067 (E. C. L. R. vol. 49), it was laid down that the holder of a check is bound to present it for payment within a reasonable time,—that is, in the course of the day succeeding that on which he receives it from the drawer; and that whether he presents it himself or *through his bankers*. Tindal, C. J., in giving the judgment of the Court, said: “The facts proved at the trial \*78] were, that the check was given by the defendant to the plaintiffs in the afternoon of Tuesday, the 10th of March; that, on Wednesday morning, the plaintiffs paid it in to their bankers, Messrs. Whitmore & Co., who presented it for payment on the morning of Thursday, the 12th, to the defendant’s bankers, on whom it was drawn; that, if the check had been presented on the Wednesday during banking-hours, it would have been paid; but that the defendant’s bankers stopped payment early on the Thursday morning, before the check was presented. It was admitted on the argument, that, if a check drawn upon a banker living in the same place is presented on the day following that on which it is received, it is presented within a reasonable time: but it was contended on the part of the plaintiffs, that, if the holder of such check wishes to procure payment of it through his bankers, he is at liberty to keep it during the day on which he receives it, to pay it in to his bankers on the day after he receives it, and the bankers again may present it to the party on whom it is drawn on the day following; that is, in effect, that, in such case, the holder of the check has one day more for presenting the check than if he had presented it himself. Evidence was given at the trial that it was an invariable usage for bankers in the city not to present checks paid in by their customers until the day following that on which they are received: but no evidence was given of any usage, that, where the customer had received the check himself on the day before he paid it in to his bankers, and a loss ensued from the insolvency of the party on whom the check was drawn, which insolvency took place subsequently to the time at which the holder would have

been bound to present it himself, such loss was borne by the drawer of the check. No case was cited, and no authority was brought before us to \*support the position that the drawer was bound to bear such loss. The case that came the nearest to it, was that of Rickford [79  
*v. Ridge*, 2 Campb. 537. In that case, the owner of the check had discounted it with a banker in the country, who sent it up to his London correspondents on the day following, who presented it the day after they received it, and in the mean time the party on whom it was drawn had become insolvent. But, in that case, the defendant, by discounting his check in the country, must be taken to have assented to that being done which was the usual and necessary course to procure payment of the check. All the other cases cited establish only, that, in the case of a bill of exchange, there is one day more allowed for giving *notice of dishonour* of a bill where it is presented through a banker, than if presented by the party himself: but no case establishes that any additional time for presenting the bill for payment is allowed under these circumstances. In the absence of evidence of a course of dealing for the drawer to pay a check under circumstances like those of the present case, from which, if it existed, a contract to pay might be inferred, and in the absence of authority to show that by law he is bound to pay, we cannot feel ourselves justified in laying it down as a rule of law that the holder of a check is entitled to one day more for presenting it, by passing it through his bankers. Nor can we see that such rule is called for as a matter of expediency or of pressing convenience. In the case of a check, the holder does not lose his remedy against the drawer by reason of non-presentment within any prescribed time after taking it, unless the insolvency of the party on whom it is drawn has taken place in the interval; that is, unless there is an actual loss to the drawer. And the instances of any such loss happening by reason of the [\*80  
 \*insolvency of the drawee taking place during the additional time for presentment which is claimed and contended for on the part of the plaintiffs, are probably so few in the course of mercantile concerns, that it can scarcely be said to be an evil calling for an extension of the time of presentment: more particularly, as the party who receives the check may always protect himself against any danger of the insolvency of the drawee, where he intends the check to pass through his bankers, by stipulating that his bankers' names shall be crossed upon the check, which would amount to an agreement on the part of the drawer of the check that the usual course of presentment through a banker should be observed." [ERLE, C. J.—In the case of a bill of exchange, the banker is considered as the holder: in the case of a check, he is merely an agent to present.] The cases referred to in the passage cited from Byles on Bills are cases between the debtor and the creditor. In *Bond v. Warden*, 1 Col. C. C. 583, there was no delay at all. There, a check for 4700*l.*, drawn upon the Lutterworth Bank, was given to A., at Lutterworth, on the 20th of April, after banking hours, in payment for an estate. A., who lived three miles from Lutterworth, immediately handed the check to B., to be placed to A.'s account at the Rugby Bank. Rugby is about six miles from Lutterworth. On the arrival of the check the same day at Rugby, the Rugby bank had closed: but the check was deposited with one of the partners of that bank for the night, and in the morning of the 21st of April it was paid in to the bank, and on the

same day transmitted by post to the Lutterworth bankers, with directions to send the amount to London. The Lutterworth bankers received the check early on the 22d. At half-past one o'clock on that day they stopped payment: and it was held that the deposit of the check with \*81] the \*Rugby bankers was a reasonable course on the part of A., and consequently that the presentment to the Lutterworth Bank was in time to prevent the check from becoming his check, and that the debt was still due to him. [WILLES, J., referred to *Moule v. Brown*, 5 Scott 694. There, on Tuesday the 28th of March, a check drawn by one Fry upon a banker at Bath was received from the defendant at one of the branches of the North Wilts Bank at Malmesbury, and was on the same day remitted to the chief office at Melksham, and thence to Bath on the 30th, and presented for payment on the 31st, and dishonoured: and it was held that the presentment was not made in due time, so as to entitle the holders to resort to the defendant.] There, there was clearly an undue delay in getting the check cashed.(a)

The Court proposed to *Shee*, Serjt., to make his rule absolute for a *new trial*; but intimated, that, as to the point reserved, viz., whether the bankers had by law until the day after they received it to present the check, the jury having found the usage to be otherwise, they thought the rule could not be sustained.

*Shee*, Serjt., however, thought otherwise, and accordingly, in the course of the present Term (with *Lush*, Q. C., and *Tompson Chitty*), was heard in support of the rule. The question is, whether the defendants were bound to transmit the check on the day on which they received it, to the bankers on whom it was drawn, or were justified in dealing with it as they did, viz., sending it on that day to their London correspondents, to be presented at the country clearing-house \*(then a \*82] few months established) to the London correspondents of the drawees, or in retaining it until the day after it was paid in, and sending it on that day directly to the drawees for payment. [WILLIAMS, J.—The only point reserved, is, whether the bankers had until next day to forward the check.] The facts are these. The check was paid in to the bank of the defendants on the morning of the 8th of July, without any intimation as to when the plaintiff received it. Upon the face of the check were printed the names of Messrs. Williams, Deacon & Co., the London agents of the defendants, for the purpose (according to the usage which was proved to have existed for some months) of indicating that it was to be dealt with in the manner in which it was dealt with, viz., by passing it to the defendants' correspondents for presentment through the clearing-house. It is submitted that the defendants might at their option retain the check until post-time of the day following that on which they received it, or send it, as they did, to their correspondents in London by the post of the day on which it was paid in; and, in either case, the check could not have reached the hands of Messrs. Whitfield & Co., the drawees, until Monday, the 11th,—the time at which it actually did reach them. The defendants clearly were guilty of no negligence if the check was presented for payment as soon as it could or need have been in any regular way. Suppose the plaintiff, having received the check on the 7th of July, had, instead of paying it in to his bankers on the 8th, sent it to an agent at Lewes for present-

(a) The case of *Cumming v. Shand*, 20 Law J., Exch. 129, was afterwards referred to.

ment (which he had the whole of the 8th to do), his agent, receiving the check on the morning of the 9th, would not have been bound to present it to the drawees for payment until the following secular day, which would have been Monday, the 11th: so that in truth no time \*whatever [\*83] was lost, and the plaintiff has sustained no damage from the act of the defendants. That this is the law, is clear from the authorities cited in Byles on Bills, p. 17. In Story on Promissory Notes, § 493, speaking of checks, the learned author says,—“The general rule is, that the holder, in order to charge the drawer in case of a dishonour, is bound to present the same for payment within a reasonable time, and to give notice thereof to the drawer within a like reasonable time; otherwise, the delay is at his own peril. What is a reasonable time will depend upon circumstances, and will in many cases depend upon the time, the mode, and the place of receiving the check, and upon the relations of the parties between whom the question arises. If the payee or other holder of the check receives it immediately from the drawer, in the same town or city where it is payable, he is bound to present it for payment to the bank or bankers, at furthest on the next succeeding secular day after it is received, before the close of the usual banking hours. He may, however, although he is not bound so to do, present it for payment on the same day on which it is drawn or delivered to him; but he is at liberty to wait until the day next succeeding. Where he receives the check from the drawer in a place distant from the place of payment, it will be sufficient for him to forward it by the post to some person at the latter place on the next secular day after it is received; and the person to whom it is thus forwarded will not be bound to present it for payment until the day after it has reached him by the course of the post.” And see Roscoe on Bills 157. The learned Judge should have told the jury that there was no such custom as that relied on by the plaintiff. A check must be presented within a reasonable time: and that has always been defined to be, any time between the receipt of the \*check and the last moment of the ordinary business hours of the [\*84] next day, if the parties reside in the same town, or until post-time of the succeeding day if the check is to be presented elsewhere. All the evidence went to show, that, before the establishment of the country clearing-house, country as well as London bankers claimed to have the whole of the day following the receipt of a check to forward it for presentment. No distinction is to be found in any of the books between the case of a banker and that of any other holder. As to sending the check for presentment direct to the drawees,—what obligation is there upon them either to remit the money or to give notice that they will honour the check? [ERLE, C. J.—I understand there was evidence of a local usage. The Judge was bound to leave that to the jury.] The declaration does not allege a local usage, but a general custom and usage amongst country bankers to transmit checks on other bankers for presentment by the evening post of the day on which they are received by them. That is an allegation of what the law is, and it was for the Judge to decide that. Instead of doing so, the learned Judge reserved leave to the defendants to enter a nonsuit, if he ought to have told the jury that the evidence did not prove the custom as alleged. If the cause went down again, it could only lead to the same result. The law is clearly laid down by Lord Ellenborough in *Rickford v. Ridge*, 2

Campb. 537, where it was held that a banker in London who receives a check by the general post is not bound to present it for payment until the following day. "The question," said Lord Ellenborough, "is, whether, if the check had arrived by post on the 14th, the bankers were bound to present it for payment on the same day. This must be decided by the law merchant. I cannot hear of any arbitrary distinction \*between one part of the city and another. It is not com-  
\*85] petent to bankers to lay down one rule for the Eastward of St. Paul's and another for the Westward. They may as well fix upon St. Peter's at Rome. It is always to be considered whether, under the circumstances of the case, the check has been presented with reasonable diligence. This is what the law merchant requires. The rule that the moment a check is received by the post, it should immediately be sent out for payment, would be most inconvenient and unreasonable. In Liverpool and other great towns different posts arrive at different hours; but it would be impossible to have clerks constantly ready to carry out all bills and checks that may arrive in the course of the day; nor, if it were possible, is it requisite, that, all other business laid aside, parties should devote themselves to the presenting of checks. The rule to be adopted must be a rule of convenience: and it seems to me to be convenient and reasonable that checks received in the course of one day should be presented the next. Is this practice consistent with the law merchant? It cannot alter it. Bankers would be kept in a continual fever, if they were obliged to send out a check the moment it is paid in. The arrangement mentioned by the plaintiff's witnesses appears subservient to the general convenience, and not contrary to the law merchant, which merely requires checks to be presented with reasonable diligence." [BYLES, J., referred to *Brandao v. Barnett*, 3 C. B. 519, 530 (E. C. L. R. vol. 54), where Lord Campbell says: "When a general usage has been judicially ascertained and established, it becomes part of the law merchant, which Courts of justice are bound to know and recognise. Such has been the invariable understanding and practice in Westminster Hall for a great many years: there is no decision  
\*86] or dictum to the contrary; \*and justice could not be administered, if evidence were to be given, toties quoties, to support such usages, and issue being joined upon them, in each particular case. WILLIAMS, J.—In *Alexander v. Burchfield*, it seems to have been treated as a question of fact, without any expression of dissatisfaction by the Court.] *Suse v. Pompe*, 8 C. B. N. S. 538 (E. C. L. R. vol. 98), is also an authority to show that settled customs are not to be made the subject of evidence. In *Kilsby v. Williams*, 5 B. & Ald. 815 (E. C. L. R. vol. 7), 1 D. & R. 476 (E. C. L. R. vol. 16), the question was as to how long, as between the bankers and the customer, the former were entitled to hold a check drawn upon them by another customer before they determined whether they would pay it or not.

ERLE, C. J., now delivered the judgment of the Court:—

This was a rule either to enter a nonsuit or for a new trial. The action was against the defendants, bankers at Worthing, for a neglect of their duty to present a check upon a bank at Lewes for payment. The first count alleged that it was their duty to send the check to the Lewes bank by the post of the day on which it was paid in at Worthing; and the second count, to send it in a reasonable time.

The evidence was, that the plaintiff paid the check to the credit of his account with the defendants on Friday morning the 8th of July, and that the defendants sent it by Friday's post to their correspondents in London for presentation at the country clearing-house on Saturday to the correspondents of the Lewes Bank. Accordingly, the check was so presented, and sent on by the post of Saturday to the bank at Lewes, where it arrived on Sunday (practically on Monday), and the payment was refused, there being then no effects; but, if it had arrived on Saturday, it would have been paid.

\*The plaintiff further showed that for eighteen months preceding the 8th of July, the course of business at the Worthing Bank had been, to send checks on country bankers to London at the time and in the manner in which this was sent; but, before the course of business had been so established for the last eighteen months, it had been the custom to send such a check to the bank of the drawee, by the post of the day on which it was received; and that, if the check in question had been so sent to Lewes, it would have arrived on Saturday, and would have been paid. [\*87]

The Judge left it to the jury to say whether the custom before the last eighteen months had been as above described; and the jury found in the affirmative: and the Judge gave leave to move to enter a nonsuit, if the Court should think he ought to have directed a verdict for the defendant, notwithstanding the evidence and this finding on the custom: and we are of opinion that the rule for a nonsuit should be made absolute.

If the case had rested on the question of reasonable time, the usage of the last eighteen months, in the absence of anything to the contrary, was good evidence of what was reasonable, and so there would have been no evidence that the defendant had not presented in a reasonable time.

If the case rested on the legal duty alleged in the first count, to send the check to the drawee by the first post, we are of opinion there was no such duty in law. No authority affirming the existence of such a duty has been found: and it would be unreasonable to require that the holder of the check should uniformly part with the possession of the instrument proving his right to be paid, and trust it to the party who has the obligation of paying it. And, although such a course might be pursued between banks corresponding in \*mutual confidence, yet each party must have the option of bringing it to an end, if his convenience should so require. [\*88]

Where the course of sending checks on country bankers to the country clearing-house in London has not been adopted, we consider that the time in which a banker holding a check for a customer ought by law to present it, is defined correctly in the case of *Rickford v. Ridge*, 2 Campb. 537. There, the plaintiffs, bankers of Aylesbury, had discounted for the defendant a check on Smith, Payne & Smith, of London, at noon of the 13th of June. On the 14th, the plaintiffs sent it to Praed & Co., their London agents, for presentment. Praed & Co. received it on the 14th, and sent it for presentment on the 15th, when payment was refused. Notice of dishonour was given on the 16th; and the action was brought to recover the money paid in discounting. It was held that the check was presented in time; the bank, receiving the check on the 13th, was not bound to send it off till the 14th; the agent

receiving it on the 14th was not bound to present it before the 15th, on which day it was done.

Although in the present case the check was on a country banker, and the defendants received it without advancing anything on it, and therefore held it for their customer, the plaintiff, still we think these circumstances make no difference in respect of the time allowed for presentment. Lord Ellenborough says the rule which convenience requires must be adopted; and he decided as above stated.

That decision has been recognised and acted on, and establishes the general rule in all cases as between parties to the check. And we think the rule applies not only as between the parties to the check, but as between banker and customer, unless circumstances exist from which a \*89] contract or duty on the part of the \*banker to present earlier, or to defer presentment to a later period, can be inferred. No such circumstances existed here; for, it was admitted that the alleged usage did not exist at the time.

If there had been no country clearing-house, the defendant, according to this rule, receiving the check on Friday, would be bound to send it by Saturday's post to their agent at Lewes to present; and that agent would be bound to present it not later than Monday. On Monday the check was presented: and so the presentment was in time, within the rule.

We therefore consider that we give effect to the leave reserved by the learned Judge, in deciding that the rule to enter a nonsuit should be absolute. Rule absolute.

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## SIR THOMAS FREMANTLE, Bart., v. THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

### BLISS v. THE LONDON AND NORTH WESTERN RAILWAY COMPANY. *April 22.*

In an action for injury by fire alleged to have been caused by a locomotive, it was proved on the part of the plaintiff that the fire broke out shortly after the passing of the defendants' engine, and that that engine had none of the appliances which had been long in use to prevent sparks or hot cinders issuing from the chimney or the fire-box, and that there was no other way of accounting for the fire than assuming it to have been caused by a spark or cinder from the engine.

For the defendants, the evidence of several scientific witnesses was to the effect that the engine in question was so constructed that it was unnecessary to provide any of the safeguards suggested by the plaintiff's witnesses, and that it was impossible that sparks or cinders could have been thrown out by it so as to cause the damage complained of.

In his summing up, the learned Judge, after a careful recapitulation of the evidence on both sides, left it to the jury to say whether or not there had been negligence on the part of the Company either in using an improperly constructed engine or in improperly using an engine of the description mentioned by the defendants' witnesses:—

Held, no misdirection.

THESE were actions brought respectively by the landlord and the \*90] tenant of certain farm buildings alleged \*to have been destroyed by a fire caused by the emission of sparks from an engine belonging to the London and North Western Railway Company.

The cause was tried before Williams, J., at the last Spring Assizes for the county of Buckingham. On the part of the plaintiff it was

proved, that shortly after an engine with a train of wagons belonging to the defendants had passed the spot, certain corn-stacks which up to that time had been safe were discovered to be burning; that the fire presently communicated itself to the adjoining farm-buildings and destroyed the whole of them; that the stacks were distant about forty yards from the railway; and that there was no other way of accounting for the fire than by assuming it to have been caused by sparks or burning cinders issuing from the chimney or the fire-box of the engine.

It was also proved by engineers and other scientific persons that it was the practice to supply the chimneys of locomotive engines with wire-gauze bonnets, or spark-catchers, or the fire-box with venetian blinds, in order to prevent accidents of this sort, and that the engine in question had neither of these appliances.

On the part of the defendants, the following witnesses,—viz. William Fairbairn, James Nasmyth, James Fenton, Edward Woods, James Hinton Bovill, and Benjamin Fothergill (all civil engineers of eminence), Mathew Kirtley, James Edward M'Connell, Robert Sinclair, and Archibald Sturrock (locomotive engineers respectively to the Midland, the London and North Western, the Eastern Counties, and the Great Northern railway companies), and Richard Peacock, Edward Slaughter, and George Crowe (engine manufacturers),—stated that bonnets and venetian blinds had ceased to be in general use for the last fifteen years (except on the South Wales railway, where the engines were [\*91 \*worked at a high pressure, and the line passed through a woody country), the improved construction of locomotives rendering them unnecessary; that the “spark-catcher” was in use only in America, where wood was principally used for fuel; and that the engine in question was so constructed as not to require any of those appliances. The engine-driver and the breaksman who were with the train at the time were also called; and they distinctly negatived the emission of any sparks or fire from the engine upon the occasion in question. And it was elicited from some of the plaintiff's witnesses that about an hour before the fire was discovered, two labourers, one of whom was an habitual and the other an occasional smoker, had been seen near the stack which first caught fire: but there was no evidence that either of these persons had smoked there.

On the part of the defendants it was submitted, on the authority of the decision of the Exchequer Chamber in the case of *Vaughan v. The Taff Vale Railway Company*, 5 Hurlst. & N. 679,† that a railway Company authorized by the legislature to use locomotive engines, is not responsible for damage from fire occasioned by sparks emitted from an engine travelling on their railway, provided they have taken every precaution in their power, and adopted every means which science can suggest to prevent injury from fire, and are not guilty of negligence in the management of the engine.

In his instruction to the jury, the learned Judge began by telling them that it could not now be disputed, that, since the legislature has thought fit to authorize the use of locomotive engines on railways, the Companies who under that authority use on their lines these engines, calculated as they are to interfere in some respect with the ordinary rights of enjoyment \*of property by others, are yet not responsible for the consequences of so using them, provided they are not [\*92

guilty of any negligence either in respect of the proper construction or the proper furniture of their engines, or in respect of the proper use and conduct of them when they shall have been so properly constructed and furnished. He told them that there were two questions for their consideration,—first, whether the destruction of the plaintiff's property was caused by the emission of a spark or fire or glowing cinder from the Company's engine,—secondly, whether it was attributable to negligence on the part of the Company either in respect of employing an engine which was not properly constructed or furnished, or which was in an improper condition as to repairs, or in respect of the careless and improper management of the engine by the driver of it. He then proceeded to say,—“It remains to consider what is to be regarded as negligence on the part of the Company, for the consequences of which they are to be held responsible. Now, as to that, the Company, in the construction of their engines, are not only bound to employ all due care and all due skill for the prevention of mischief accruing to the property of others by the emission of sparks or any other cause, but they are bound to avail themselves of all the discoveries which science has put within their reach for that purpose, provided they are such as under the circumstances it is reasonable to require the Company to adopt. For example, if the danger to be avoided were insignificant or very unlikely to occur, and the remedy suggested were very costly or very troublesome, or such as interfered materially with the efficient working of the engine, then you will have to say whether it could reasonably be expected that the Company should adopt such a remedy for such an evil. On the \*93] other hand, if the risk were considerable, and \*if the expense or trouble or inconvenience of providing the remedy is not great in proportion to the risk, then you would have to say whether the Company could reasonably be excused from availing themselves of such a remedy because it might to some extent be attended with cost or other disadvantage to themselves. But, perhaps, in the view that you may take of this case, these considerations are not of any very great importance, because the Company have in fact rested their defence as to the first question on this mainly, that the engine in question was so constructed, and had incorporated so many improvements, that it could not by possibility have emitted sparks so as to cause the mischief charged, unless there was negligence either in using the engine in an improper condition as to repairs, or negligence on the part of the driver in improperly working the engine. Now, if, after having considered the evidence which has been brought before you, you can come to no other conclusion than that there was no negligence in respect of the condition of the engine and no negligence or improper conduct on the part of the driver in working the engine; if you further adopt the view presented by the witnesses on the part of the defendants, that it was impossible, looking at the construction of the engine, that sparks could have been emitted such a distance from the engine; then I need not tell you there is an end of the case,—because then, upon the first question, you will necessarily come to the conclusion that the plaintiffs have failed to make out their first assertion, viz. that the fire was caused by a spark or a heated cinder which had been emitted from the chimney of the engine. But, if you should think, notwithstanding the evidence on the part of the defendants, that the destruction of the plaintiff's property *was* caused

by a spark emitted from the defendants' engine, then you \*will [\*94 have to consider whether the defendants' evidence with respect to the nature and construction of the engine is not cogent against them upon the second question. Because, if the engine is of such a quality, and is so constructed, and has so many modern improvements that no spark could be emitted from it that could have caused the mischief, unless there had been negligence either in the condition or the working of the engine; if you are of opinion that a spark or cinder was emitted and did cause the mischief, then you will say whether it does not necessarily follow that there must have been negligence either in the condition of the engine or in the conduct of the driver in working it." A little further on he said,—If, without adopting the evidence to that extent, you should adopt it to the extent of saying that with such an engine it was a highly improbable and most remote contingency that any lighted cinder could be ejected from an engine so constructed, then you would have to say whether it is reasonable that the defendants should be required to resort to contrivances for a remedy, which, according to the evidence on the part of the defendants, would materially interfere with the working efficiency of the engine; and you would have further to say whether any negligence could be fairly imputable to them by reason of having omitted to adopt a remedy under such circumstances.

The learned Judge then proceeded to comment upon the evidence, reminding the jury that the onus of showing that the fire really was caused by a spark or ignited coal from the defendants' engine lay on the plaintiff, and concluded as follows,—“Now, that being the evidence on the part of the plaintiff, it is opposed by all the evidence on the part of the defendants. The question is, whether, notwithstanding the evidence of impossibility which has been adduced by all that \*numer- [\*95 ous company of witnesses, do you nevertheless think that the plaintiffs have established the fact that the fire could not be accounted for upon any other supposition than that it must have come from the engine. If you do, then I must repeat that all this evidence that is so powerful upon the first question is cogent against the defendants upon the second, because it then goes to show that the fire was occasioned by an engine which was so perfect in its quality that nothing could have caused the emission of sparks except negligence, either in the condition of the engine or in the way in which it was worked by the driver; and therefore the evidence then becomes cogent the other way. But there is on the other hand this supposition, which involves the only other remaining question to which I shall now call your attention. It is possible that you may think that the circumstances of the fire are such as to lead you to the conclusion that these gentlemen (the defendants' witnesses), in spite of all their science, and in spite of the experiments, must be mistaken, and that nothing could have occasioned the fire but a spark or cinder from the engine; and therefore, though you may withhold your credit from these gentlemen to the full extent of its being impossible that the fire could have issued from the engine, and so find in favour of the plaintiff upon the first question, it is possible that you may give them credit so far, that, although you do not think they are right in saying that it was impossible that the fire could have been caused by the engine, yet, according to their evidence, it was so remote a contingency, so great an improbability that the fire should happen therefrom, then the question

arises for you to determine, was it reasonable to require from the Company that they should use these precautions of bonnets and other contrivances, so encumbering the working of their engine, to meet \*a  
 \*96] risk so remote and so improbable? You must apply your minds to that question, and say whether you think that it is reasonable that they should be required."

The jury returned a verdict in each case for the plaintiff, the amount to be ascertained, by arrangement between the parties, by an arbitrator.

*Bovill*, Q. C. (with whom were *Mills*, Q. C., and *A. K. Stephenson*), on a former day in this term, moved for a new trial, on the ground of misdirection, and that the verdict was against evidence. He submitted, upon the authority of the case of *Vaughan v. The Taff Vale Railway Company*, 5 Hurlst. & N. 679,† that a railway Company authorized by the legislature to use locomotive engines, is not responsible for damage from fire occasioned by sparks emitted from an engine travelling on their railway, provided they have taken every precaution in their power and adopted every means which science can suggest to prevent injury from fire, and are not guilty of negligence in the management of the engine; and therefore that in this case it was incumbent on the plaintiff to show not only that the fire of which he complained was caused by sparks or cinders emitted from the defendants' engine, but also that the defendants had been guilty of some negligence either in working a defective engine, or in improperly working an efficient one; and that, taking the whole summing up together, it amounted to this,—that, assuming the engine to have been of the best possible construction, and that the Company had been guilty of no negligence in any other respect, it was for the jury to say whether or not the Company should have adopted some of the contrivances for diminishing danger which had been suggested by the plaintiffs' witnesses. [WILLES, J.—In *Vaughan v.*  
 \*97] \*The Taff Vale Railway Company, the parties afterwards came before me at Chambers, and I made an order, by consent, staying the proceedings on payment of the damages and costs. The Company in that case had allowed the embankments of their railway to be in such a state as to become peculiarly liable to ignite from anything that might fall from an engine.] The whole tendency of the summing up here was, to remove all discretion from the jury.

ERLE, C. J.—We will take an opportunity of referring to my Brother Williams, and will on a future day communicate the result of our deliberation. *Cur. adv. vult.*

ERLE, C. J., now delivered the judgment of the Court:—

In this case we are of opinion that there should be no rule,—not on the ground that the verdict was against the weight of evidence, as there was evidence which supported the finding of the jury, and the judge is not dissatisfied; nor for misdirection.

Mr. *Bovill* relied upon the law laid down in *Vaughan v. The Taff Vale Railway Company*, 5 Hurlst. & N. 679,† that railway companies are not responsible for damage arising from the use of locomotive engines on a railway, unless they are guilty of negligence either in respect of the construction or the furniture or the conduct of such engines: and he contended that a railway Company would not be guilty of negligence in respect of the construction of their engines, if that construction was the best adapted both to prevent the damage complained of and also to be

efficient in power; and that, if the construction was that which was best adapted for those purposes in *known \*practical use* at the time the alleged cause of action arose, the duty of the Company was performed. He then alleged that the witnesses for the defendant *proved* that the engine in question was of that construction; and that there was a misdirection in telling the jury to consider whether in respect of *such* an engine it was in their opinion reasonable to require that the defendants should have recourse to some one of the protections described in the evidence to be useful in the case of an engine which emits sparks likely to produce mischief; and our attention was drawn to certain paragraphs supposed to mean that there might be negligence if the jury thought that other precautions against fire might have been adopted by the Company beyond the best in known practical use at the time. [\*98]

But, upon reading the whole summing up together, we do not find that the Judge expressed any such opinion. He stated that the evidence for the defendants was extremely powerful to show that the engine was of the best known construction: but he also stated the evidence of the plaintiff's witnesses, that, in their opinion, with the engine in question, the risk of causing mischief by sparks was not improbable, and that the engine was so constructed as to be dangerous, without a precaution of some kind: and he left to the jury to decide whether they believed either the plaintiff's or the defendants' witnesses on this point; and he also left to them to consider whether each set of witnesses might not have been mistaken in the degree of excellence or of defect imputed to the engine; and, if so, it was still for them to decide either for the defendants, if no further precautions could with reason be required, or for the plaintiff, if they were in reason requisite.

We are fully sensible of the importance to railway companies of the considerations adverted to by Mr. *\*Bovill*; and we should grant the rule if we saw any doubt about the correctness of the summing up. But, as it appears to us that there was a conflict of testimony upon a question of degree which was necessarily for the jury, and that the learned Judge left to them all the questions raised before him with clear discrimination and sound judgment, the rule must be refused. [\*99]

Rule refused.

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The Guardians of the Poor of the CAMBRIDGE UNION, Appellants;  
MARY PARR, Respondent. April 22.

A woman obtained an order for the admission of herself and her two children (aged respectively seven and four years) into the workhouse of the union of the borough within which her place of abode was situate, and at six in the evening took the children to the outer gate of the workhouse and left them there with the order, returning herself to her own house:—  
Held, not a "running away" from her children within the 4th section of the Vagrant Act, 5 Geo. 4, c. 83.

At a petty sessions held at Cambridge, on the 12th of November, 1860, Mary Parr appeared to answer an information and complaint by the clerk to the guardians of the poor of the Cambridge Union, which charged that the respondent, on the 1st of November, 1860, at the parish of St. Andrew-the-Less, in the said borough, did then and there

run away from her two children whom she was then and there legally bound to maintain, and did then and there leave them chargeable to the said poor-law union, against the form of the statute in such case made and provided. The justices, after hearing the evidence produced in support of the said information and complaint, dismissed the same.

The appellants being dissatisfied with that decision, demanded a case setting forth the facts and grounds of the determination for the opinion \*100] of this Court, \*pursuant to the 20 & 21 Vict. c. 43. The following case was thereupon stated:—

It was proved that the respondent, being a widow, on the 1st of November, 1860, applied to the relieving officer of the said union, and obtained an order for the admission of herself and her two children, aged respectively seven and four years, into the workhouse of the said union, situate at the borough aforesaid, and at 6 o'clock on the evening of the same day she took them to the outer gate of the said union workhouse and rang the bell. She then put the order for admission into the hands of her eldest child, and immediately went away, leaving the said two children at the gate. The porter who answered the bell saw a woman (who was proved to be the respondent) in the act of leaving the said gate; and stated that, when he arrived at such gate, she had left, and the two children were waiting there with the said order for admission to the said workhouse; and that he thereupon admitted the said two children, and they continued in the workhouse and chargeable to the common fund of the said union from that time until the time of hearing the said complaint.

The respondent did not either at or after the time of the alleged offence leave the said borough where the said workhouse is situate, and where she usually resides.

The ground of the justices' determination to dismiss the said complaint, was, that the facts proved against the respondent did not amount in law to the offence charged in the information.

The question for the opinion of the Court of Common Pleas was, whether the leaving of her children by the respondent under the circumstances proved, was a "running away and leaving her children chargeable," within the meaning of the 4th section of the Vagrant Act, 5 G. 4, c. 83.

\*101] *\*Couch*, for the appellants.—The question is, whether the respondent had been guilty of an offence within the meaning of the 5 G. 4, c. 83, s. 4, which provides that persons committing certain offences therein mentioned shall be deemed rogues and vagabonds. Amongst the offences there enumerated is the following.—"every person running away and leaving his wife or his or her child or children chargeable, or whereby she or they or any of them shall become chargeable to any parish, township, or place." The point is one of considerable importance to the guardians of unions. [BYLES, J.—The respondent, when she left her children at the gate of the union, returned to the house where she had long resided, and where she was well known. Surely this was no running away.] The governing words of the clause are, "leaving his or her child or children chargeable." These children were of such ages that the poor-law makes them inseparable from their mother: this matter underwent much discussion in the case of *The*

Queen v. The Inhabitants of Birmingham, 5 Q. B. 210 (E. C. L. R. vol. 48).

The language of this section differs very materially from that of the former statute upon this subject, 5 G. 1, c. 8, s. 1, which, after reciting that divers persons run or go away from their places of abode into other counties or places, and sometimes out of the kingdom, some men leaving their wives, a child, or children, and some mothers run or go away leaving a child or children upon the charge of the parish or place where such child or children was or were born or last legally settled, although such persons have some estates which should ease the parish of their charge in whole or in part, enacted "that it should and might be lawful for the churchwardens or overseers of the poor of such parish or place where any such wife or child or children shall be so left, upon application to and by \*warrant or order from any two justices of the peace, to take and seize so much of the goods and chattels, and [\*102 receive so much of the annual rents and profits of the lands and tenements of such husband, father, or mother, as such two justices of the peace as aforesaid shall order or direct, for or towards the discharge of the parish or place where such wife, child, or children are left, for the bringing up and providing for such wife, child, or children," &c., subject to confirmation by the sessions.

ERLE, C. J.—I am of opinion that the decision of the justices was right. The 5 G. 4, c. 83, s. 4, was, I think, directed against persons running away, in the sense of absconding or concealing themselves, or absenting themselves to a long distance, and leaving their wives or children chargeable to the parish. Here, the respondent, it appears, having obtained an order for the admission of herself and her two children into the workhouse of the union, took the children to the gate of the union workhouse and rang the bell, and, placing the order in the hands of one of the children, she left them at the gate, and returned to her own home in the borough. I do not think she is liable to be punished for this as a person who has "run away," leaving her children, within the meaning and intention of the statute.

WILLES, J.—I am of the same opinion.

BYLES, J.—I am entirely of the same opinion. I cannot help thinking that the language of the 5 G. 1, c. 8, s. 1, affords an apt explanation of what is meant by "running away" in the 4th section of the Vagrant Act, viz., "running or going away from their places of abode into other counties or places, and sometimes out \*of the kingdom." [\*103 Here, neither the place from which nor the place to which the respondent went, is within these words. This, be it observed, is a criminal case, and therefore the respondent has a right to a strict construction of the Act of Parliament.

KRATING, J., was at Nisi Prius.

Decision affirmed.

## COTESWORTH and Another v. SPOKES. Feb. 25

Three quarters' rent being in arrear under a lease containing a clause of re-entry on non-payment of rent within twenty-one days after each quarter-day, the lessors, on the 2d of October, distrained, and after sale of the distress there remained due more than a quarter but less than a half year's rent. The lessors on the 2d of November served the lessee with a writ in ejectment under the 210th section of the Common Law Procedure Act, 1852:—Held, that the action was not maintainable, there not being half a year's rent in arrear at the time of the service of the writ.

THE defendant was tenant to the plaintiffs of certain premises in the parish of St. Giles, Camberwell, under a lease bearing date the 24th of March, 1857, for a term of twenty-one years, at the yearly rent of 80*l.* payable on the usual quarter-days. The lease contained a power of re-entry by the lessors if the rent should be in arrear for twenty-one days.

At Michaelmas Day, 1860, rent had become due for three quarters: and the plaintiffs on the 2d of October, distrained for 59*l.* 6*s.* 6*d.*, the amount of arrears of rent then due, less property-tax. The goods were sold under the distress on the 16th of October, and realized 26*l.* 7*s.*, leaving 32*l.* 19*s.* 6*d.* then due, to countervail which there remained nothing upon the premises.

On the 2d of November, the plaintiffs served the defendant with a writ in ejectment under the 210th section of the Common Law Procedure Act, 1852 *\*(15 & 16 Vict. c. 76)*, by which it is enacted, \*104] that, "in all cases between landlord and tenant, as often as it shall happen that *one half-year's rent shall be in arrear*, and the landlord or lessor to whom the same is due hath right by law to re-enter for the non-payment thereof, such landlord or lessor shall and may, without any formal demand or re-entry, serve a writ in ejectment for the recovery of the demised premises, or, in case the same cannot be legally served, or no tenant be in actual possession of the premises, then such landlord or lessor may affix a copy thereof upon the door of any demised messuage, or in case any such action in ejectment shall not be for the recovery of any messuage, then upon some notorious place of the lands, tenements, or hereditaments comprised in such writ in ejectment, and such affixing shall be deemed legal service thereof, which service or affixing such writ in ejectment shall stand in the place and stead of a demand and re-entry; and, in case of judgment against the defendant for non-appearance, if it shall be made appear to the Court where the said action is depending, by affidavit, or be proved upon the trial in case the defendant appears, that half a year's rent was due before the said writ was served, and that no sufficient distress was to be found on the demised premises countervailing the arrears then due, and that the lessor had power to re-enter, then and in every such case the lessor shall recover judgment and execution in the same manner as if the rent in arrear had been legally demanded and a re-entry made; and, in case the lessee or his assignee shall permit and suffer judgment to be had and recovered on such trial in ejectment, and execution to be executed thereon, without paying the rent and arrears, together with full costs, and without proceeding for relief in equity within six months after such \*105] execution executed, then *\*and in such case the said lessee, his assignee, and all other persons claiming and deriving under the*

said lease, shall be barred and foreclosed from all relief or remedy in law or equity, other than by bringing error for reversal of such judgment, in case the same shall be erroneous, and the said landlord or lessor shall from thenceforth hold the said demised premises discharged from such lease; and if on such ejectment a verdict shall pass for the defendant, or the claimant shall be nonsuited therein, then in every such case such defendant shall have and recover his costs; provided that nothing herein contained shall extend to bar the right of any mortgagee of such lease, or any part thereof, who shall not be in possession, so as such mortgagee shall and do, within six months after such judgment obtained and execution executed, pay all rent in arrear, and all costs and damages sustained by such lessor or person entitled to the remainder or reversion as aforesaid, and perform all the covenants and agreements which on the part and behalf of the first lessee are and ought to be performed."

The cause was tried before Byles, J., at the first sitting at Westminster, in Hilary Term last, when it was objected by the defendant (who defended in person) that the plaintiffs were not entitled to recover, inasmuch as at the time of issuing the writ half a year's rent was not due.

On the part of the plaintiffs it was submitted, that the forfeiture and the right to proceed under the statute were complete when the given amount of rent became due and it was ascertained that there was no sufficient distress to countervail *the rent due*.

The learned Judge ruled in favour of the defendant, on the ground that there was not half a year's rent in arrear at the time of serving the writ, and he accordingly directed a verdict to be entered for him,—\*reserving to the plaintiffs leave to enter the verdict for them if [\*106 the Court should be of opinion that his ruling was erroneous.

*Montague Smith*, Q. C., in the course of the term, obtained a rule nisi.—He referred to *Brewer d. Lord Onslow v. Eaton*, 3 Dougl. 230, and *Doe d. Lawrence v. Shawcross*, 3 B. & C. 752 (E. C. L. R. vol. 10), 5 D. & R. 711 (E. C. L. R. vol. 16).

The defendant showed cause in person, contending that the distress was an acknowledgment by the lessors that the tenancy was still subsisting, and consequently a waiver of the forfeiture; and that the lessors were not in a position to avail themselves of the 210th section of the Common Law Procedure Act, 1852, unless half a year's rent was due at the time of the issuing of the writ,—the provision being a highly penal one, and therefore to be construed strictly.

*Montague Smith*, Q. C., and *Prentice*, in support of the rule.—There clearly was no waiver. Waiver implies intention. A landlord cannot waive a forfeiture until he knows it exists. Here, the forfeiture was not complete at the time the distress was taken: it only became so when the distress was found to be insufficient to countervail the arrears of rent. (a) In *Brewer d. Lord Onslow v. Eaton*, 3 Dougl. 230, in ejectment under the 4 G. 2, c. 28, on a right of re-entry for non-payment of rent, it was held that the taking an insufficient distress after the forfeiture for rent accruing before was not a waiver of the right to re-enter. Lord Mansfield said: "The statute speaks of a landlord 'who hath by law a right to re-enter,' which

(a) Meaning, the lessor's right to avail themselves of the 210th section of the Common Law Procedure Act, 1852.

\*107] \*means a right to re-enter reserved to him in the lease. At common law, the distress operated as a waiver of the forfeiture which occurred on the non-payment; but here the distress affords no presumption that the landlord has waived the forfeiture, because, as the statute requires him to prove on the trial that no sufficient distress was to be found on the premises countervailing the arrears due, he has distrained in order to complete the title given him by the statute." (a) In *Doe d. Smelt v. Fuchau*, 7 East 286, it was held, that, under a proviso in a lease for the re-entry of the landlord in case the rent should be in arrear for fourteen days and no sufficient distress found upon the premises, he was entitled to recover in ejectment, on proof of half a year's rent due at Lady-Day, and no distress on the premises *on some day in May*, and the declaration served on the 6th of *June*,—the defendant giving no evidence to rebut the inference that there was no sufficient distress on the premises within the terms of the proviso, as, by showing that there was a sufficient distress on the premises in *May* up to the day of the demise inclusive, or on the 6th of June, when the declaration was served, if that were material with reference to the statute 4 G. 2, c. 28: for, on such proof by the plaintiff, the statute dispenses with proof of a demand of the rent on the day it became due. "If," says Lord Ellenborough, in the course of the argument, "the landlord find no sufficient distress on the premises on any day after the rent is in arrear, and the rent be not paid for fourteen days after it is due, surely the right of entry accrues." And, in giving judgment, the Court say: "The plaintiff gave in evidence, that, sometime in May, which was after the rent had fallen in arrear for more

\*108] than fourteen days, \*there was no sufficient distress on the premises. That was *prima facie* evidence at least to call upon the defendant to show that there was a sufficient distress on the premises within the terms of the proviso. And the jury might presume from the evidence of there being no sufficient distress some time in May, that there was none in May before the 2d, when the demise is laid, nor on the 6th of June, when the declaration was served, if that were material; unless the defendant showed that there was." In *Doe d. Lawrence v. Shawcross*, 3 B. & C. 752 (E. C. L. R. vol. 10), 5 D. & R. 711 (E. C. L. R. vol. 16), it was held, that by the statute 4 G. 2, c. 28, s. 2, the service of the declaration in ejectment is substituted for the demand of the rent, which at common law must have been made upon the day when the forfeiture accrued in case of non-payment of rent, and therefore that it was no ground of nonsuit in ejectment that the declaration was served on a day subsequent to the day on which the demise was laid, that being after the rent became due; because the title of the lessor must be taken to have accrued on the day when the forfeiture would have accrued at common law by non-payment of the rent. Bayley, J., there says: "The plaintiff is entitled to recover upon proving that half a year's rent was due before the declaration in ejectment was served, that no sufficient distress was found upon the premises, and that he had a power to re-enter. I am of opinion that the true construction of the statute is that which has been put upon it for ninety-five years, viz. that it substitutes the service of the declaration in ejectment for the demand of rent, which at common law must have been made upon the day when the forfeiture was to accrue in case of its not being paid." There is no

(a) See the note at the end of that case.

great hardship in this construction; for, the lessee may regain possession of the premises on payment of the rent in arrear and costs. [WILLIAMS, J.—It has \*been held that the acceptance of rent accruing after a forfeiture, operates a waiver: see Plowd. Com. 133.] [\*109] There has been no acceptance of rent after the accruing of the forfeiture. The lessor distrained for the purpose of ascertaining whether or not there was a sufficient distress upon the premises to countervail the arrears then due. [WILLES, J.—A right of re-entry for breach of covenants in a lease is waived by the lessor's bringing an action for rent accruing subsequently to the breach, with knowledge of its existence: *Dendy v. Nicholl*, 4 C. B. N. S. 376 (E. C. L. R. vol. 93). It would seem, therefore, that the distress for the rent due at Michaelmas did amount to a waiver of any forfeiture for any previous breaches of covenant which were capable of being waived. ERLE, C. J.—The plaintiffs were not in a condition to maintain this action until half a year's rent was in arrear, and twenty-one days had expired, and there was the absence of a sufficient distress upon the premises. There was no right of re-entry for the rent due at Midsummer, because no evidence of the want of a sufficient distress: and, before the right accrued in respect of the Michaelmas rent, the plaintiffs had received by means of the distress 26*l.* 7*s.* Then, at the end of the twenty-one days, there was not half a year's rent in arrear.] Bringing an action for rent accruing due subsequently to the breach may well amount to a waiver: but distraining is a mere mode of ascertaining whether or not there has been a complete breach. Until that step is taken, it cannot be ascertained whether or not the goods upon the premises will be sufficient to countervail the arrears due. [WILLIAMS, J.—When do you say you ought to have laid the demise under the old form of procedure?] Twenty-one days after Michaelmas. *Cross v. Jordan*, 22 Law J. Exch. 70, was also referred to.

*Cur. adv. vult.*

\*WILLIAMS, J., now delivered the judgment of the Court:—(a) [\*110] This was an action of ejectment by the plaintiffs, as landlords, to recover against the defendant, their tenant, the demised premises, by reason of a forfeiture of the lease incurred by the non-payment of rent.

At the trial before my Brother Byles, it appeared that the rent was 80*l.* per annum, payable at the usual quarterly feast days, and that the lease entitled the lessor to re-enter if the rent should be in arrear for twenty-one days. At Michaelmas last 60*l.* was due for three quarters ending on that day. On the 2d of October, the plaintiffs took a distress for those arrears, which, on the 16th of October, realized 26*l.* 7*s.*, leaving due 32*l.* 19*s.* 6*d.*; so that, although 13*l.* 13*s.* of the Midsummer quarter's rent remained unsatisfied, there was no longer one half year's rent in arrear.

On the 2d of November the writ was served. The plaintiffs did not proceed according to the common law, by a formal demand of the rent, but sought to avail themselves of the 210th section of the Common Law Procedure Act, 1852 (substituted for the 4 G. 2, c. 28, s. 2), by which it is enacted, that, "in all cases between landlord and tenant, as often as it shall happen that one half-year's rent shall be in arrear, and the

(a) The Judges present at the argument were Erle, C. J., Williams, J., Willes, J., and Keating, J.

landlord and lessor to whom the same is due hath a right by law to re-enter for the non-payment thereof, such landlord or lessor shall and may, without any formal demand or re-entry, serve a writ of ejectment for the recovery of the demised premises, &c., which service, &c., shall stand in the place and stead of a demand and re-entry." The statute \*111] proceeds to enact, that, if it shall "be proved upon the trial, in case the defendant appears, that half a year's rent was due before the said writ was served, and that no sufficient distress was to be found on the demised premises countervailing the arrears then due, and that the lessor had power to re-enter, then and in every such case the lessor shall recover judgment and execution in the same manner as if the rent in arrear had been legally demanded, and a re-entry made," &c. It was further proved at the trial that no sufficient distress was to be found. But the Judge, on these facts, ruled that a verdict ought to be entered for the defendant, on the ground that a half-year's rent was not in arrear at the time the writ was served. And we are of opinion that this verdict ought not to be disturbed.

Mr. *Montague Smith*, on the argument of the rule which he had obtained, in pursuance of leave reserved at the trial, to enter a verdict for the plaintiffs, contended that it was not material to the plaintiffs' right under the statute that there should be half a year's rent due to the lessors at the time they served the writ, because the statute, when the writ has been served, puts the parties into the same situation as if a legal demand had been made on the day when it ought to have been made at common law, and the title must be taken to have accrued at that time, i. e. in the present case, on the last of the twenty-one days after the rent became due. It must be observed that the statute enables a landlord to proceed under it in cases where there shall be half a year's rent in arrear, and a right to re-enter for the non-payment thereof, i. e. for non-payment of half a year's rent: see *Doe d. Dixon v. Roe*, 7 C. B. 134 (E. C. L. R. vol. 62). In the present case, therefore, no right to re-enter in respect of the rent due for the half-year which ended at Michaelmas could be relied on, because it never was in arrear for twenty- \*112] one days. But Mr. *Montague Smith* contended, that, at all events, a complete title accrued on the twenty-first day after the Midsummer rent became due: and *Doe d. Lawrence v. Shawcross*, 3 B. & C. 752 (E. C. L. R. vol. 10), 5 D. & R. 711 (E. C. L. R. vol. 16), was cited. That case certainly shows, that, in cases to which the Act applies, the title accrues at the time when the demand of rent ought to have been made at common law. But the statute authorizes the service of the writ "as often as it shall happen that one half-year's rent shall be in arrear:" and in the present case there was no such arrear at the time the writ was served. The case, therefore, is not within the Act, unless the words "shall be" ought to be construed "shall have been." But there is nothing unreasonable in holding that the statute meant to confine its operation to cases where the tenant was six months in arrear at the very time when the landlord had recourse to this statutory remedy. It is not, however, necessary for us to decide this point, because we are clearly of opinion that the plaintiff waived any breach of the condition of re-entry which accrued earlier than Michaelmas, by distraining for the Michaelmas rent.

Had the distress been confined to the rent due at Midsummer, it would

not have waived the forfeiture for the non-payment of that rent, as appears by the case of *Brewer v. Lord Onslow*, 3 Dougl. 230, which was cited by Mr. *Smith*. But the distinction is plain, that, though a distress in respect of rent accruing due before the breach of condition is no waiver of it, yet a distress for rent accruing after such breach, with notice of it, is a waiver of it, because such a distress affirms and admits the continuance of the tenancy up to the day when the rent so distrained for became due. If it were otherwise, the plaintiffs would by this action establish their right to the possession of the demised premises, and to deal with the defendant as \*a trespasser at a date [\*112 anterior to Michaelmas, although the plaintiffs, by their distress, have treated the defendant as having been rightfully in possession as tenant up to that date.

For these reasons we are of opinion that the rule must be discharged.  
Rule discharged.

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MARTHA DRAPER, Appellant; JOHN SPERRING, Respondent.  
*April 22.*

The owner of a market, by her agent, placed hurdles in the public street for the purpose of penning sheep on market-days, for which she received certain tolls. The droppings of the sheep created a nuisance on the pavement, which the justices, on summons under the Nuisances Removal Act, 1855, 18 & 19 Vict. c. 121, held to have been created by the "act, default, permission, or sufferance" of the owner of the market, within the meaning of the 12th section of the Act, and made an order upon her to remove the same:—

Held, that the decision of the justices was correct.

THE following case was stated pursuant to s. 2 of the 20 & 21 Vict. c. 43, for the opinion of this Court:—

At a petty sessions holden at Crewkerne, in and for the division of Crewkerne, in the county of Somerset, on the 16th of June, 1860, before two justices of the peace in and for the said county, the following complaint was heard and determined:—The complaint was preferred by John Sperring, the inspector of nuisances appointed by the nuisance removal committee for the tything of Crewkerne (hereinafter called the respondent), against Martha Draper (hereinafter called the appellant), under s. 12 of the 18 & 19 Vict. c. 121, being the Nuisances Removal Act for England, 1855, and charged, that, on the 3d of April, 1860, there was, on a certain pavement or causeway, situate in Sheep-Market Street, in Crewkerne aforesaid, in front of a messuage or dwelling-house in the possession of Sidney Morris Cornelius, an accumulation or deposit of dung or filth caused by the penning and standing of sheep on the said pavement, on Saturday, the 31st of March previously, being a market-day at Crewkerne aforesaid; and that the same, not being [\*114 \*cleared or washed away after the removal of the said sheep, was a nuisance or injurious to health; and that the said nuisance was caused by the act or default of the appellant, by reason that the appellant used or occupied the said pavement or causeway for letting pens for the standing of sheep thereon for hire and reward, and had, on the said 31st of March, allowed sheep to stand and be penned for a long space of time on the said pavement or causeway, and had received tolls

and profits in respect thereof; and that, in consequence of such standing or penning, the said dung or filth was deposited and left, and the appellant had neglected to cleanse or wash away the same, and to remove the said nuisance so thereby created; and that, although the said nuisance had since the said 3d day of April been removed or discontinued, there was reasonable ground for believing that the same or the like nuisance was likely to recur on the same premises. And upon such hearing, the justices, considering that the cause of nuisance complained of did exist on the said pavement on the said 3d of April, and was caused by the act, permission, or default of the said Martha Draper, and that, though the same had since been removed, a similar nuisance would be likely to recur on the said premises, did by their order in writing, bearing date the said 16th of June, prohibit the appellant from allowing to remain on the said premises after the sheep were removed therefrom, any dung or filth which should be deposited or left on the said premises by reason of the penning or standing of such sheep thereon, such penning or standing of sheep thereon being by the act or sufferance and for the profit of the said Martha Draper: And, if the said order of prohibition should be infringed, then they did authorize and require the said nuisance removal committee for the tything of Crewkerne aforesaid from time to time to \*115] enter upon the said premises and to do all such \*works, matters, and things as should be necessary for carrying the said order into full execution according to the said Nuisances Removal Act for England, 1855.

The appellant being dissatisfied with this determination upon the hearing of the said complaint as being erroneous in point of law, applied to the justices to state and sign a case setting forth the facts and the grounds of their determination for the opinion thereon of this Court. The following case was thereupon stated:—

At the hearing, it was proved, on the part of the complainant, the respondent in this appeal, that, on the 3d of April last, a nuisance existed on the pavement facing and adjoining a house in Sheep-Market Street, Crewkerne, occupied by Sidney Morris Cornelius, in consequence of sheep having been penned thereon the previous Saturday, the 31st of March, which was a market-day; that the nuisance was occasioned by sheep-droppings and urine, and was likely to recur; that, on the said 31st of March, the sheep-pens were put up by Richard Lacey, who was employed for the purpose by Thomas Taylor March, the market-bailiff of the appellant; that the appellant claims to be the owner of the markets and fairs held in the town of Crewkerne, and to receive tolls in respect thereof; that, on the said 31st of March, the said market-bailiff received of a Mr. Harding a toll of 5s. for one hundred sheep, part of which were penned on that day on the aforesaid pavement; that the hurdles used for penning the said sheep belonged to the appellant; that, on large market-days, the pens extend over the pavement two or three feet into the road, and on fair days eight or nine feet into the road, but, on the said 31st of March only the pavement and a shallow open gutter between the pavement and the road were enclosed by the pens; that there is on market-days an accumulation of droppings from cattle \*116] \*in the public road where they are exposed for sale; that there are surveyors of the highways of the parish of Crewkerne; that toll is always paid to the market-bailiff for sheep sold in the market,

even if they are not penned; and that the toll for sheep is 1s. a score at the markets, and 1s. 6d. at the fairs.

It was contended on the part of the defendant, the appellant, that there was no occupation or ownership in the appellant, within the meaning of the Nuisances Removal Act for England, 1855; that the toll is inherent to the market claimed by the appellant, and that she is entitled to an easement; that it is not a messuage, land, or tenement, within the interpretation clause of the Nuisances Removal Act; that the right or privilege of a fair or market is only a temporary easement, and the enjoyment of it is not an occupation within the 2d section of the Act; that, there being surveyors of the highways, and the nuisance being on the highway, the liability to cleanse is between the occupiers of the houses and the surveyors of the highways; and that the toll is payable in respect of the animal, and not for the occupation of the land.

It was proved on the part of the appellant, that a toll of 1s. a score was payable for sheep penned at the market, even if not sold; that, for the last fifty-five years and upwards, the droppings of the sheep have been swept away by the occupiers of the houses against which the sheep were penned, and that the market-bailiff never cleaned them away, except any that might be on the pavement which comes against a house of the appellant in Sheep-Market Street, and those droppings he only cleaned away at such times as the house was unoccupied; that, sometimes the droppings have been allowed by the occupiers of some of the houses to remain until washed away by the rain; and that occasionally some of the occupiers of houses \*in Sheep-Market Street, instead of employing their own servants to clean the pavement after a market, paid a man to do it. [\*117

The poor-rate book for the parish of Crewkerne was put in, and in it the appellant is rated as follows:—

Names of occupiers.	Name of owner.	No. referring to map.	Name or description of property rated.	Situation.	Quantity.	Estimated rental.	Rateable value.
Draper, Martha.	Herself.	14. a.	The market-house and market-place	Market Place.	a. r. p.	£ s.	£ s.
					32	60 0	40 0
		273. a.	The markets and fairs of Crewkerne.	West St.	2	1 10	1 1
					34	61 10	41 1

The justices being of opinion, that, from the appellant's exercise of the right she claimed to erect hurdles on a market-day at Crewkerne, and to enclose ground with such hurdles, without the consent of the respondent, and from her allowing the ground, when so enclosed, to be used for the purpose of penning sheep, during the time of which penning the ground could not be used as a highway, and the nuisance having been created in consequence of the penning of sheep, she was a person within the 12th section of the Nuisances Removal Act for England, 1855, by whose permission or sufferance the nuisance arose, and the ground, whilst so enclosed, was land or tenement within the meaning

of the Act. And they therefore gave their determination against the appellant in the manner above stated.

The questions of law arising on the above statement were, whether the ground over against the house of Sidney Morris Cornelius, in Sheep-Market Street, Crewkerne, which the appellant enclosed with hurdles \*118] \*on the 31st of March last, was, whilst so enclosed, land or tenement within the meaning of the Nuisances Removal Act for England, 1855; and whether the enclosing of the ground by the appellant, and her allowing sheep to be penned thereon, rendered her liable under the 12th section of the same Act, as the person by whose act, default, permission, or sufferance the nuisance arose. Whereupon, the opinion of the Court was asked on the said questions of law, whether or not the justices were correct in their determination as aforesaid, and as to what further should be done or ordered by the Court in the premises.

*Welsby*, for the appellant.(a)—The question arises upon the Nuisances Removal Act, 1855, 18 & 19 Vict. c. 121. By the interpretation clause, s. 2, "owner" is to include "any person receiving the rents of the property in respect of which that word is used, from the occupier of such property, on his own account, or as trustee or agent for any other person, or as receiver or sequestrator appointed by the Court of Chancery or under the order thereof, or who would receive the same if such property were let to a tenant;" and the word "premises" is declared to "extend to all messuages, lands, or tenements, whether open or \*119] enclosed, whether built on or not, and whether public or \*private." The word "nuisances" is defined by s. 8 to include, amongst other things, "any premises in such a state as to be a nuisance or injurious to health," or "any accumulation or deposit which is a nuisance or injurious to health." The 11th section gives power to the local authority to enter premises to abate nuisances. And s. 12 enacts, that, "in any case where a nuisance is so ascertained by the local authority to exist, or where the nuisance in their opinion did exist at the time when the notice was given, and, although the same may have been since removed or discontinued, is in their opinion likely to recur, or to be repeated on the same premises or any part thereof, they shall cause complaint thereof to be made before a justice of the peace; and such justice shall thereupon issue a summons requiring the person by whose act, default, permission, or sufferance the nuisance arises or continues, or, if such person cannot be found or ascertained, the owner or occupier of the premises on which the nuisance arises, to appear before any two justices in petty sessions assembled at their usual place of meeting, who shall proceed to inquire into the said complaint; and if it be proved to their satisfaction that the nuisance exists or did exist at the time when the notice was given, or, if removed or discontinued since the notice was given, that it is likely to recur or to be repeated, the justices

(a) The points marked for argument on the part of the appellant were:—

"1. That the place where the alleged nuisance existed was not a messuage, land, or tenement within the meaning of the Nuisances Removal Act, 1855: 2. That the appellant was not the owner or occupier thereof within the meaning of that Act: 3. That the appellant was not a person whose duty it was under the said act to prevent or remove the said alleged nuisance. 4. That the alleged nuisance was not in the nature of a recurring nuisance within the meaning of the said Act: 5. That, for all or some of the aforesaid reasons, the justices had no power to make a prohibitory order on the appellant under the said Act."

shall make an order in writing under their hands and seals on such person, owner, or occupier, for the abatement or discontinuance and prohibition of the nuisance, as thereafter (s. 13) mentioned, and shall also make an order for the payment of all costs incurred up to the time of hearing or making the order for abatement or discontinuance or prohibition of the nuisance." The appellant was neither owner nor occupier of the land upon which the nuisance was created, nor the person "by whose act, \*default, permission, or sufferance the nuisance arises or continues." All that she does, is, to receive the market-tolls and (by her agent) put up hurdles for sheep-pens. [BYLES, J.—She may be lessee of the franchise.] It may be so. Nothing appears upon the face of the case as to the person in whom the freehold of the land is vested. It clearly can be no part of the duty of the appellant as owner of the market to cleanse the public street of the droppings of sheep lawfully penned there.

*Kingdon, contra.*(a)—The two questions reserved by the justices for the opinion of the Court, are,—first, whether the ground over against the house of Sidney Morris Cornelius in Sheep-Market Street, Crewkerne, which the appellant enclosed with hurdles on the 31st of March last, was, whilst so enclosed, land or tenement within the meaning of the Nuisances Removal Act, 1855,—secondly, whether the enclosing of the ground by the appellant, and her allowing sheep to be penned thereon, rendered her liable, under the 12th section of the same Act, as the person by whose act, default, permission, or sufferance the nuisance arose. Either of these points being decided in favour of the respondent will sustain the conviction. Assuming \*that the appellant had a [\*121 right to use the highway for the purposes of a market, she was bound, at all events, so to use it as not to create a public nuisance: Com. Dig. *Market* (A). [WILLES, J.—The highway may have been originally dedicated to the public subject to the market.] That would not affect the construction of the Act of Parliament. That which is done by the appellant is done for her profit. The nuisance is created by penning the sheep to the particular spot. The 12th section of the statute does not appear to point so much to the owner or occupier of the premises as to the person who causes the nuisance: and, looking at the evidence which was given before the justices, it is impossible to say that the appellant is not the person by whose act, default, permission, or sufferance the nuisance arose. In *Curwen v. Salkeld*, 3 East 538, it was held that the lord of a manor to whom a grant of a market is made "infra villam de W.," may hold it anywhere infra villam de W.; and, whether villa extend to the town of W. or the township or parish of W., the lord has a right to remove the market-place from one situation to another within the precinct of his grant.

*Welsby*, in reply.—The place where the alleged nuisance occurred was not "land" or "premises" within the Nuisances Removal Act; nor

(a) The points marked for argument on the part of the respondent, were as follows:—

"That the appellant was a person by whose act, default, permission, or sufferance, the nuisance in question arose, within the meaning of the 12th section of the Nuisances Removal Act, 1855:

"That the appellant was the owner or occupier of the premises on which the nuisance in question arose, within the meaning of the said section of the said Act, and that the said premises were premises within the meaning of the 2d section of the said Act:

"That the Highway Act does not affect proceedings under the Nuisances Removal Act, 1855."

was the appellant in any sense the "occupier." And, having a right to place hurdles on the highway for the purposes of the market, she was guilty of no offence, and could not be said to be in any sense a person by whose act, default, permission, or sufferance the nuisance arose.

ERLE, C. J.—I am of opinion that the decision of the justices should be affirmed. The complaint was against the owner of a market having \*122] a right to pen \*sheep on market-days on the pavement of a certain street in the town of Crewkerne, for allowing the droppings to remain on the pavement so as to become a nuisance to the inhabitants. The charge is, that the appellant, being the person receiving the tolls and profits of the market, was the person by whose act, default, permission, or sufferance the nuisance resulting therefrom was brought about, and consequently was the person upon whom was cast the duty of removing the nuisance resulting therefrom. The exact right to the soil or the occupation of the road is not brought before us: but, in answer to the first question the justices have put to us, I am inclined to hold that the ground which the appellant enclosed with hurdles was whilst so enclosed land or tenement within the meaning of the Act of Parliament. The second question put to us, is, whether the enclosing of the ground by the appellant, and her allowing sheep to be penned thereon, rendered her liable under the 12th section of the act, as the person by whose act, default, permission, or sufferance the nuisance arose. As far as I can gather from the statement submitted to us, the appellant had the option of placing the hurdles for penning sheep in any part of the street. She chose to place them on the pavement in front of the respondent's house, and refused, when called upon to do so, to cause the droppings which through her act were there accumulated to be removed. It appears to me that this was substantially a recurring nuisance: and Mr. *Welsby* has failed to satisfy me that the justices came to a wrong conclusion.

WILLES, J.—At first I was strongly disposed to accede to the argument presented by Mr. *Welsby*, that, in substance, all that the appellant did, was, to enjoy her right to the market according to the grant, by receiving tolls from persons having a right to bring sheep there, \*123] \*for sale. But, upon considering the facts more closely, I have come to the conclusion that that is not a correct view. The appellant not only received the tolls, but she made enclosures by means of hurdles, to hold the sheep on the spot where the nuisance was created. It was in consequence of that restraint of the sheep that the nuisance arose. It is clear that the proprietor of the market was under no legal obligation to provide such accommodation as this. The distinction between the enjoyment of the market, which is not an occupation of the land, and an exercise of proprietary right is well explained in the case of *The Mayor, &c., of Northampton v. Ward*, 2 Stra. 1238, where Lee, C. J., says: "Though every person has of common right a liberty of coming into a public market for the purpose of buying and selling, yet he has not of common right a liberty of placing a stall there, but he must acquire that by a compensation, which is called stallage, and, in Blunt's Law Dictionary, Minshen's Boyer, verbo *Estallage*, and Spelman's Glossary, is defined to be a satisfaction to the owner of the soil for the liberty of placing a stall upon it; and, if in the erecting one

the soil is broke, it is called *picage*. And this of stallage is so fixed to the owner of the soil, that, in Mo. 474, it was held to descend to the Borough English heir, though the right to hold the market goes to the eldest son. It is not properly a toll, which can only be due by grant or prescription; whereas, stallage is demandable in the case of a newly erected market; and the soil is no further considered as dedicated to the public than the common right of entry goes: 2 Inst. 220; Rex v. Burdett, 1 Lord Raym. 149." With this explanation, it appears to me that the appellant is the person against whom the Act of Parliament intended that recourse should be had. I do not think the other argument is entitled to such weight. The \*12th section gives the [\*124 remedy in the alternative against the owner or occupier of the land or against the person by whose act, default, permission, or sufferance the nuisance arises. The paramount object of the Act was, the removal of nuisances likely to be injurious to health. No interference with rights was contemplated.

BYLES, J.—I agree with the rest of the Court in thinking that the decision of the justices was correct. All the observations which it was necessary to make have already been made by my Lord and my Brother Willes; and there is nothing which I can profitably add.

KEATING, J., was at Nisi Prius.

Decision affirmed.

### BAKER v. CARTWRIGHT. May 3.

It is no answer to an action for a breach of promise of marriage, that the plaintiff had before the making of the promise been of unsound mind, and had been confined in a lunatic asylum, provided she was sane at the time of the promise.

THE declaration stated that the plaintiff and the defendant agreed to marry one another, and a reasonable time for such marriage had elapsed, and the plaintiff had always been ready and willing to marry the defendant; yet the defendant had neglected and refused to marry the plaintiff: and the plaintiff claimed 500*l*.

The defendant pleaded,—first, that he did not promise and agree as alleged,—secondly, a denial of the breach of contract alleged,—thirdly, that he entered into the said agreement in the declaration mentioned upon the faith and under the belief that the plaintiff had been and was of sound mind, and had never been afflicted with insanity, and had never been legally confined as a lunatic in a lunatic asylum; \*whereas, [\*125 the plaintiff, before the making of the said agreement, had been and was of unsound mind, and had been legally confined as a lunatic in a lunatic asylum, which the defendant first discovered after making the said alleged agreement and before the alleged breach thereof, wherefore the defendant then refused to marry the plaintiff, which was the alleged breach.

The plaintiff joined issue on the above pleas; and, for a second replication to the third plea, said that the unsoundness of mind therein mentioned existed only for a short time, to wit, four months, and that, after she had been confined in the lunatic asylum as in that plea mentioned, and before the making of the said agreement, she the plaintiff

became and was and from thence hitherto had been of sound mind, and had been and was legally discharged from the said lunatic asylum.

She also demurred to the third plea, the ground of demurrer stated in the margin being, "that the fact of the plaintiff having been legally in a lunatic asylum is no justification for the breach of the defendant's promise." Joinder.

The defendant demurred to the second replication to the third plea, the ground of demurrer stated in the margin being, "that the replication confesses the allegations in the defendant's plea, and it is no sufficient ground of reply, that, before the agreement, the plaintiff became of sound mind, and was legally discharged from the lunatic asylum." Joinder.

\*126] *Macnamara*, for the plaintiff.(a)—The third plea \*affords no answer to the action. No fraud on the plaintiff's part is suggested: and it is perfectly consistent with the plea that the plaintiff herself may not have been aware of her alleged unsoundness of mind. And, assuming that she was aware of it, the mere non-disclosure of a pre-existing disease or delusion can afford no answer to a claim for damages for the non-performance of a contract the only implied condition attached to which, according to the recent decision of the Exchequer Chamber in *Beachey v. Brown*, 1 Ellis, B. & E. 976 (E. C. L. R. vol. 96), is chastity.(b) The contention on the other side would import an implied warranty of the sanity of the party, which would be obviously contrary to public policy.

*Overend*, Q. C. (with whom was *Daly*), contra.—The object of this \*127] sort of contract is as well to acquire the \*close intimacy of a companion for life as the lawful propagation of the species. This object would evidently be not only entirely frustrated, but would probably entail mischief on the community by perpetuating hereditary disease of the most painful character, if such a defence as this were not allowable. A person afflicted with such a malady,—a recurrence of which is always to be apprehended,—can never be fit properly to discharge the duties of a wife and a mother. There can be no good reason why sanity should not be as much an implied exception in such a contract as chastity.

ERLE, C. J.—The general doctrine laid down by the Exchequer Chamber in the case referred to, is, that the contract binds, and that want of chastity is the only exception. That being so, I think we are

(a) The points marked for argument on the part of the plaintiff were as follows:—

"1. That the fact of the plaintiff having been of unsound mind and having been in a lunatic asylum, is no justification for the breach of the defendant's promise:

"2. That the plaintiff having been legally discharged from the said lunatic asylum, and being of sound mind at the time of the promise on the part of the defendant, was entitled to have the said promise fulfilled, or to recover damages for its non-performance."

(b) Cockburn, C. J., in that case says: "I agree that there are many things which a man might desire to have communicated to him, if they existed, at the time of making the contract, such as that the plaintiff is in debt, or subject to other liabilities, or some circumstances relating to her person, her temper, her disposition, the discovery of which would yet not entitle the defendant to refuse to fulfil his engagement. It might be right to disclose such things: and yet it has never been held that the discovery of them justified a party in breaking his contract. Where it turns out that a woman is of unchaste conduct, which goes to the very root of the contract of marriage, there, from the excess and necessity of the case, the man is released from his contract. But nothing of the sort is disclosed here: there is no imputation on the virtue or honour of the plaintiff; and the case does not fall within the principle which makes the misconduct of the woman an answer to the action."

bound to hold that the third plea of the defendant in this case affords no answer, and consequently there must be judgment for the plaintiff.

WILLIAMS, J.—I am entirely of the same opinion. No fraud is alleged.

The rest of the Court concurring,

Judgment for the plaintiff.

\*RICHARD ARCHER WALLINGTON, Appellant; JOHN WHITE, ANNE WHITE, and ELIZABETH WHITE, [\*128 Respondents. April 22.

By a Local Act, passed in 1825, for improving the town of Leamington, the commissioners were authorized to repair all the streets, &c., within the town; and by s. 47, it was enacted, that when any new streets, &c., within the town should be laid out and made, and the footpaths and carriage-roads thereof should be well and sufficiently flagged, paved, gravelled, and put in good order and repair to the satisfaction of the commissioners, then, on application of the owner of the soil, &c., it should be lawful for the commissioners, by writing under their hands, to declare the same to be public highways, and from and after such declaration made they should be repaired by the commissioners. By the 128th section the commissioners were empowered to make rates upon the tenants or occupiers of all dwelling-houses, &c., within the town; and by s. 27 every person assessed under or by virtue of the Act for or in respect of any messuages, &c., in the town, was to be exonerated, released, and for ever discharged from the performance of statute duty for the repairs of the public highways within the town. In 1830, and before the passing of the General Highway Act, 5 & 6 W. 4, c. 50, a new street was formed in Leamington, called Springfield Street, which was dedicated to the public by the owner of the soil, and had ever since been used as a public highway; but the local commissioners had never declared it to be a public highway under the 47th section of the local Act.

The Public Health Act, 1848 (11 & 12 Vict. c. 63), was applied to the town of Leamington in 1852: and the local board, under the authority of the 69th section of that Act, made an order upon the owners of the premises abutting on Springfield Street, to repair, &c., the same:—Held, that the parties were liable to be rated, Springfield Street not being a “highway” within the Public Health Act, the provision of the local Act having prevented it from becoming such in the absence of an adoption by the commissioners under s. 47.

THIS was a case stated by justices under the 20 & 21 Vict. c. 43, for the opinion of this Court on a question of law which arose in the exercise of their summary jurisdiction under the Public Health Act, 1848.

The following are the circumstances of the case:—

In the year 1852, the parish of Leamington was by a provisional order of the general board of health, confirmed and made absolute by the Public Health Supplemental Act, 1852 (No. 2), created a district for the purposes of the Public Health Act, 1848; and the said Public Health Act, with the exception of s. 50, was applied to and put in force within the said district.

By s. 69 of the Public Health Act, 1848, it is enacted that, “in case any present or future street, or any part thereof (not being a highway), be not sewered, levelled, paved, flagged, and channelled to the satisfaction of the local Board of Health, such board may by notice in writing to the respective owners or occupiers of the \*premises fronting, [\*129 adjoining, or abutting upon such parts thereof as may require to be sewered, levelled, paved, flagged, or channelled, require them to sewer, level, pave, flag, or channel the same within a time to be specified in such notice: and, if such notice be not complied with, the said local

board may, if they shall think fit, execute the works mentioned or referred to therein, and the expenses incurred by them in so doing shall be paid by the owners in default, according to the frontage of their respective premises, and in such proportion as shall be settled by the surveyor, or, in case of dispute, as shall be settled by arbitration (having regard to all the circumstances of the case) in the manner provided by this Act; and such expenses may be recovered from the last-mentioned owners in a summary manner, or the same may be declared by order of the said local board to be private improvement expenses, and be recoverable as such in the manner thereafter provided."

The Local Government Act, 1858, took effect in the said district of Leamington from the 1st of September, 1858. By s. 58 of this Act it is enacted, that, "the powers given to local boards of health by the 69th and 70th sections of the Public Health Act, 1848, to compel the sewerage, levelling, paving, flagging, and channelling of streets that are not highways repairable at the public expense, and after the completion of such works to declare such streets highways repairable at the public expense, shall extend to providing the means of lighting, metalling, or making good such streets, and may be exercised in respect of the carriageway, footway, or any part of such streets: and the said powers shall also be deemed to have extended and shall extend and be exercised in respect of any street or road of which a part was at the time of the \*130] application of the Public Health Act, 1848, or is or may \*be, a public footpath, or repairable at the public expense, as fully as if the whole of such street or road had been or was a highway not repairable at the public expense."

After the 1st of September, 1858, a certain street or road within the district of Leamington, called Springfield Street, was not sewered, levelled, paved, flagged, channelled, metalled, and made good to the satisfaction of the local board of health for the said district. Thereupon the local board, by notice in writing to all the owners within the meaning of the said Act of the premises fronting, adjoining, or abutting upon the whole of the said street or road, required them respectively, within one calendar month from the service thereof, to sewer, level, pave, flag, channel, metal, and make good so much of the said street or road as their said premises respectively fronted or adjoined to or abutted upon. Such notice was not complied with by any of the said owners; and the local board thereupon executed the works mentioned or referred to in the said notice, and incurred certain expenses in so doing. The respondents were and are owners of certain premises abutting upon the said street or road; and the proportion of the expenses, calculated according to the frontage of their said premises, and settled by the surveyor under the said Public Health Act as due from them, was and is 48*l.* 10*s.* 1*d.* Payment of this amount was demanded from the respondents, and refused by them; and thereupon the local board (the said expenses not having been declared to be private improvement expenses) took proceedings under the said Public Health Act for the recovery in a summary manner of the said amount, with interest at the rate of 5*l.* per cent. per annum, amounting in all to the sum of 49*l.* 14*s.* 4*d.*

\*131] Accordingly, upon the 4th of July, 1860, an \*information was laid before a justice of the peace for the county of Warwick, by the appellant, Richard Archer Wallington, who was and is clerk to

the said local board, and who laid such information as such clerk and on behalf of the said local board.

The said information came on to be heard on the 18th of July, 1860, and by adjournment on several other days, and finally on the 22d of November, 1860, before two justices. The respondents, having been duly summoned, attended by their attorney on each of the said occasions.

It appeared that, if the said street or road called Springfield Street was not on the 1st of September, 1858, a highway within the meaning of the 69th section of the Public Health Act, the respondents were liable to the payment of the said sum of 49*l.* 14*s.* 4*d.*, and the appellant as such clerk was instructed to recover the same: but, if the said street or road was a highway within the meaning of the said section, the respondents were not liable to the payment of the said sum, or any sum whatever, in respect of the expenses incurred by the local board as aforesaid.

The facts and circumstances as to whether the said street or road was or was not a highway at the time aforesaid, were as follows:—

In and long before the year 1820, there were two streets or roads within what is now the district of Leamington, called respectively "Tuckbrook Road" and "Brunswick Street," which run nearly parallel to each other, and both of which were common and public highways. The houses belonging to the respondents in Springfield Street, were erected in the year 1820. In or soon after the year 1830, a person of the name of John Smith laid out upon his own land a new street or road running across from Tuckbrook Road to Brunswick Street, and \*connecting those two streets or roads; and about the same time [\*132 he and others built several houses along the line of the street or road so laid out by him. In the same year, the said John Smith opened throughout to the public the new said street or road so laid out by him, which is that now known as Springfield Street, and referred to above, made a sewer thereunder, and the same has ever since remained open. At the time when he opened it, the said John Smith intended the said new street or road to be used as and to be a common and public highway: and the same has in fact ever since been adopted and used by the public as a common and public highway, and been used uninterruptedly by any persons who have desired to make use of the same.

In the year 1825, an Act of Parliament (6 G. 4, c. cxxxiii.) was passed, the title of which is "An Act for paving or flagging, lighting, cleansing, watching, regulating, and improving the town of Leamington Priors, in the county of Warwick."

By section 1 of this Act, certain persons were appointed to be commissioners for paving, lighting, watching, regulating, and improving the town of Leamington, and for putting the Act into execution.

By section 26, it was enacted that it should be lawful for the said commissioners, and they were thereby authorized and required, from time to time, and at all times thereafter, as often as they should think fit, to cause, order, and direct all or any of the present and future streets, lanes, highways, passages, and other public places, as well carriageways as footways in the said town, to be repaired, made, formed, amended, and sustained, in such manner and with such materials as the said commissioners should think proper.

By section 47, it was enacted, that, "When any new streets, squares, \*133] crescents, lanes, ways, or passages \*should be laid out and made in the said town of Leamington Priors, and the footpaths and carriage-roads thereof should be well and effectually flagged, paved, stoned, gravelled, and put in good order and repair, to the satisfaction of the said commissioners, then, on application of the owner or owners of the soil, or a majority of them, it should be lawful for the said commissioners, and they were thereby empowered and required, from time to time, by writing under their hands, to declare the same to be public highways and passages; and, from and after such declaration made, such new streets, squares, crescents, lanes, ways, and passages as aforesaid, and every of them, should be deemed and taken to be public highways and passages to all intents and purposes, and be repaired by the said commissioners as the other parts of the streets, squares, crescents, lanes, ways, and public passages within the said town are by this Act directed to be managed and governed."

The said Act continued in force (except so far as it was repealed or altered in certain particulars immaterial to the present purpose by a subsequent local and personal Act of the year 1848) until the year 1852, when by the said provisional order of the general board of health, as confirmed by the said first-mentioned Act, the following sections of the said local and personal Act of the year 1825 were repealed (except in so far as the same related to any rate, assessment, composition, mortgage, assignment, annuity, or contract made, executed, or granted, or any act, matter, or thing done, or any offence committed, or penalty incurred, before the passing of the said Act confirming the said order), that is to say, section 1 to 27,—29 to 47,—68 to 81, all inclusive, 94, 99 to 104, both inclusive, 108, 112, 121, 128, 137, 139, 155, 158, 164, all inclusive.

\*134] The said street or road called Springfield Street was \*within the town of Leamington Priors: but the commissioners under the said local Act did not at any time declare the same to be a public highway or passage, nor was any application ever made to them so to do pursuant to the provisions of the said 47th section of the said local Act: nor was there any evidence of the commissioners having at any time adopted the said street or road as a public highway.

The houses in Springfield Street were from time to time rated or assessed by the commissioners under section 128 of the said local Act. Prior to 1835, and in the rate-book of that year, they are described as being in Springfield Street; and such rate or assessment was always at the sum of 1s. in the pound of the yearly rent or value thereof, and not upon either of the higher proportions mentioned in that section.

The local board caused the street to be lighted with gas in the year 1854.

No notice was given at any time after the passing of the statute 5 & 6 W. 4, c. 50, of any intention to dedicate the said street or road to the public; nor was any certificate granted by two justices or enrolled at the quarter sessions, as directed by that act: and the said local board of health did not at any time before the execution of the said works as before mentioned declare the said street or road to be a highway under section 70 of the Public Health Act, 1848.

Up to the time of the execution of the said works by the local

board as before mentioned, neither the commissioners, nor the local board of health, nor the respondents, had ever repaired the said street or road, or any part thereof, or executed any works of sewerage, levelling, paving, flagging, channelling, metalling, or making good to or upon the same, or any part thereof; nor had the expenses of any such repairs or works, or any part thereof, been borne or paid out of \*any [\*135 parochial district or other rates or assessments, or by the inhabitants of the said parish or district at large. Any repairs that were executed were done at the expense of the said John Smith.

Upon these facts and circumstances, it was contended by the appellant that the said street or road had never become a public highway under the provisions either of the said local Act or of the 5 & 6 W. 4, c. 50, or of the Public Health Act, 1848; and that the same was not on the 1st of September, 1858, a highway within the meaning of the said Public Health Act, 1848. On the part of the respondents, it was contended that the said street or road became a highway at some time between the year 1830 and the coming into operation of the statute 5 & 6 W. 4, c. 50, by dedication to and adoption and user by the public, and is a highway within the meaning of the 69th section of the Public Health Act.

In order that the question might be conveniently raised by a case to be stated under the 20 & 21 Vict. c. 43, the justices dismissed the information, upon the ground that the said street or road was a highway on the 1st of September, 1858, as contended by the respondents.

The question for the opinion of the Court was, whether the decision in dismissing the said information on the ground aforesaid, was or was not right in point of law. If the decision was right, the order dismissing the said summons was to stand good; if not, the Court were to remit the said matter to the justices, in order that they might proceed further therein.

*Horace Lloyd*, for the appellant.—The question for the consideration of the Court in this case, is, whether the provisions of the Local Act of the 6 G. 4, c. cxxxiii., for paving, lighting, and improving the town of \*Leamington Priors, and of the Public Health Act, 1848, 11 [\*136 & 12 Vict. c. 63, prevented what was done by the owner of the land in this case from constituting a dedication of the road in question to the public, so as to render the inhabitants at large liable for the repair of it. Before the passing of the General Highway Act, 5 & 6 W. 4, c. 50 (in 1835), the common law prevailed throughout England in respect of the repair of highways. The case of *Illingworth v. Montgomery*, 2 Law Times, N. S. 726,—where the Court of Queen's Bench held that the owners and occupiers were not bound to do the works required of them by the local board, the street in question being a highway repairable by the inhabitants at large,—differs most materially from the present case; for, there, there was abundant evidence of dedication to and adoption of the street by the public, and there was nothing in the Local Act to require the consent of the commissioners to the new street becoming a public highway. By the provisions of the Local Act, the streets of Leamington Priors were put in the same position as they are now by the Public Health Act, 1848; and it was not competent to the owner of the soil to throw the repairs upon the inhabitants at large, without having first complied with the conditions imposed by that (the

Local) Act. [ERLE, C. J.—But for the Local Act, this would have been a public highway.] Yes. The earlier sections of the Act appoint commissioners for carrying the Act into effect. The 23d section vests in them all the roads, &c., in the town. The 26th section imposes upon them the duty of repairing and cleansing the present and future streets, &c. The 27th section enacts, “that from and after the 11th of October, 1825, all and every persons and person who shall be assessed under or by virtue of this Act, for or in respect of any messuages, lands, tenements, or hereditaments in the said town, shall be, and \*137] \*they, he, and she are and is hereby exonerated, released, and for ever discharged from the performance of statute duty for the repairs of the public highways within the said town, and from the payment of any composition money in lieu of such statute duty, and from all rates and assessments for the repairs of the said highways in the said town for or in respect of such messuages, lands, tenements, or hereditaments.” The 28th section enacts, “that, from and after the passing of the act, so much and such part of the turnpike-road passing into or through the said town of Leamington Priors as lies within the limits of this Act shall cease to be part of the said turnpike-road, and the trustees of the said turnpike-road shall not be bound to contribute towards the repairs thereof.” The 31st section provides, that, where owners neglect to complete roads in new streets, the commissioners may complete the same, and compel the owners to pay the expenses. By s. 33, the commissioners are empowered to pave and flag, and to charge the occupiers with the expenses. And s. 47 enacts, “that, when any new streets, squares, crescents, lanes, ways, or passages shall be laid out and made in the said town of Leamington Priors, and the footpaths and carriage-roads thereof shall be well and effectually flagged, paved, stoned, gravelled, and kept in good order and repair, to the satisfaction of the said commissioners, then, on application of the owner or owners of the soil, or of the owner or owners of the adjoining houses of such streets, or a majority of them, it shall be lawful for the said commissioners, and they are hereby empowered and required, from time to time, by writing under their hands, to declare the same to be public highways and passages; and, from and after such declaration made, such new streets, squares, crescents, lanes, ways, and passages as aforesaid, and \*138] every of them, shall be \*deemed and taken to be public highways and passages to all intents and purposes, and be repaired by the said commissioners as the other parts of the streets, squares, crescents, lanes, ways, and public passages within the said town are by this Act directed to be managed and governed.” Then the 128th section empowers the commissioners to impose rates upon the tenants or occupiers of all dwelling-houses and other buildings and property within the town of Leamington Priors: and all persons assessed thereto are by s. 27 exonerated and discharged from the performance of statute duty for the repairs of the public highways within the town. It is submitted, on the part of the appellants, that it was as impossible for the owner of a new street to throw upon the inhabitants at large the expense of forming and repairing it under the Local Act as it is now by the corresponding sections (68, 69, and 70) of the Public Health Act, 1848, 11 & 12 Vict. c. 63; the intention being, not to allow an owner to throw open a mere strip of land, and cast the burthen of forming it into a proper and con-

venient highway upon the inhabitants. The 68th section enacts "that all present and future streets, being or which at any time become highways within any district, and the pavements, stones, and other materials thereof, and all buildings, implements, and other things provided for the purposes thereof by any surveyor of highways, or by any person serving the office of surveyor of highways, shall vest in and be under the management and control of the local board of health; and the said local board shall from time to time cause all such streets to be levelled, paved, flagged, channelled, altered, and repaired, as and when occasion may require; and they may from time to time cause the soil of any such street to be raised, lowered, or altered, as they may think fit, and place and keep in repair fences and posts \*for the safety of foot [\*139 passengers," &c. The 69th section enacts, "that, in case any present or future street, or any part thereof (not being a highway), be not sewered, levelled, paved, flagged, and channelled to the satisfaction of the local board of health, such board may, by notice in writing to the respective owners or occupiers of the premises fronting, adjoining, or abutting upon such parts thereof as may require to be sewered, levelled, paved, flagged, or channelled, require them to sewer, level, pave, flag, or channel the same within a time to be specified in such notice; and, if such notice be not complied with, the said local board may, if they shall think fit, execute the works mentioned or referred to therein; and the expenses incurred by them in so doing shall be paid by the owners in default, according to the frontage of their respective premises, and in such proportion as shall be settled by the surveyor, or in case of dispute, as shall be settled by arbitration (having regard to all the circumstances of the case) in the manner provided by this Act; and such expenses may be recovered from the last-mentioned owners in a summary manner; or the same may be declared by order of the said local board to be private improvement expenses, and be recovered as such, in the manner hereinafter provided." And the 70th section, which corresponds with the 47th section of the local Act, enacts, "that, if any present or future street, not being a highway at the time when this Act is applied to the district in which it is locally situate, be sewered, levelled, paved, flagged, and channelled to the satisfaction of the local board of health, the said local board may, if they shall think fit, by notice in writing put up in any part of the street, declare the same to be a highway; and thereupon the same shall become a highway, and be from time to time repaired by them out of the rates levied in that behalf under \*the authority [\*140 of this Act; and every such notice shall be entered amongst the proceedings of the said local board: Provided always that no street shall become a highway as last aforesaid, if within one month after notice in writing shall have been put up as last aforesaid the proprietor of such street, or the person representing or entitled to represent such proprietor, shall by notice in writing to the said local board object thereto." These provisions have not been complied with here. [BYLES, J.—The question is, whether this street had become a public highway, in the sense which that word is explained to bear in the 13th section of the 15 & 16 Vict. c. 42, viz. "any highway repairable by the inhabitants at large," before the year 1835.] This street clearly was not such a highway, consequently the decision of the justices was wrong.

*Quain*, for the respondents.(a)—Suppose the parish had been indicted for not repairing the street in question between 1830 and 1835 (when the General Highway Act passed), what answer would they have had? They are clearly liable, unless they show that the liability is cast upon somebody else. As far as the commissioners are concerned, they could not be bound to repair Springfield Street until the conditions prescribed by the 47th section of the Local Act had been complied with. [ERLE, C. J.—The 27th section is strongly in favour of the appellant.] That presupposes that the 47th section has been complied with. Springfield Street was a highway before the passing of the 5 & 6 W. 4, c. 50: and \*141] there is nothing in the \*Local Act to exempt the inhabitants at large from their common law liability to repair it. One of the earliest cases upon the subject is that of *The King v. The Inhabitants of St. George, Hanover Square*, 3 Campb. 222. There a statute enacted that the paving of a particular street should be under the care of commissioners, and provided a fund to be applied to that purpose; and another statute, which was passed for paving the streets of the parish, contained a clause that it should not extend to the particular street: and it was held that the inhabitants of the parish were not exempted from their common law liability to keep the street in repair; that the duty of repairing might be imposed upon others, and the parish be still liable; and that the parish were under the obligation in the first instance of seeing that the street was properly paved, and might seek a remedy over against the commissioners.(b) So, in *Bussey v. Story*, 1 N. & M. 639 (E. C. L. R. vol. 28), 4 B. & Ad. 98, 109 (E. C. L. R. vol. 20), the Court say: “It is a mistake to suppose, as was urged in the argument on behalf of the plaintiff in error, that the object of this(c) and other Turnpike Acts, is, to relieve parishes and townships from the burthen of repairing the highways. Their object is, to improve the roads, for the general benefit of the public, by imposing a pecuniary tax in addition to the means already provided by law for that purpose. The obligation to maintain all public roads (with the exception of those which are to be repaired *ratione tenuræ* or *clausuræ*) is a public obligation, and in the nature of a public tax. The repairing by parishes or townships of some parts, and by counties of other parts, are merely modes which the law has provided for discharging that obligation. It is their share of the public burthen which those districts have to pay, and which is imposed \*142] for the general benefit of \*the community: and tolls are an additional tax for the same purpose.” In *Illingworth v. Montgomery*, 2 Law Times, N. S. 726, the Local Act (43 G. 3, c. xc.) had a provision (s. 40) exactly like the 47th section of the Local Act in this case. In *Roberts v. Hunt*, 15 Q. B. 17 (E. C. L. R. vol. 69), it was held, that, if a road has been dedicated to the public, and used, but the necessary steps have not been taken, by notice, &c., under the 5 & 6 W. 4, c. 50, s. 23, to make it repairable by the parish, it is still a highway in other respects; and an action is maintainable for obstructing it to the plaintiff's damage. [WILLIAMS, J.—The doubt was whether the parish

(a) The point marked for argument on the part of the respondents was as follows:—“That the street in question having become a public highway before the Highway Act, the justices were right in dismissing the information.”

(b) And see *The King v. Oxfordshire (Inhabitants)*, 4 B. & C. 194 (E. C. L. R. vol. 10), 6 D. & R. 231 (E. C. L. R. vol. 16).

(c) 52 G. 3, c. xxxviii.

could be liable to repair by reason of mere dedication. The case of *Rex v. St. Benedict*, 4 B. & Ald. 447, held that they could not. The King *v. Leake*, 2 N. & M. 595 (E. C. L. R. vol. 28), 5 B. & Ad. 469 (E. C. L. R. vol. 27), decided otherwise. The 5 & 6 W. 4, c. 50, s. 23, restored the law to what Bayley, J., and the other Judges, had settled it in *Rex v. St. Benedict*.] If this be not a highway repairable by the inhabitants at large, what is it?

*Lloyd* was heard in reply.

ERLE, C. J.—I am of opinion that the adjudication of the justices in this case was wrong, and that the order of the board of health was a lawful order. That order was made under the 69th section of the Public Health Act, 1848 (11 & 12 Vict. c. 63), and dealt with Springfield Street, which is a street within the town of Leamington Priors, as being a street or highway not repairable by the inhabitants at large. The justices, on the contrary, held that it was a highway repairable by the inhabitants at large. I am of opinion that the justices were wrong in so holding. It appears from the statements in the case that Springfield Street was dedicated to the public by the owner of the soil in [\*143 \*1830. It is a street within the town of Leamington Priors; and within that town the commissioners under the Local Act of 6 G. 4, c. cxxxiii., had extensive powers for raising money for repairing the streets, lanes, &c. If the matter rested on the common law, according to the decisions the powers of the commissioners would be merely auxiliary, and the street in question would have been a highway which the inhabitants at large would have been bound to repair, unless the provisions of the Local Act prevented it from becoming a highway repairable by the inhabitants at large. The Local Act was passed in the year 1825, and the dedication took place in 1830; and therefore, Springfield Street being within the town of Leamington Priors, it would not become a highway repairable by the commissioners under that Act, unless they had chosen to adopt it, when it would be without the jurisdiction of the board of health. By the 26th section of the Act, the commissioners are required to cause all the present and future streets, lanes, highways, &c., in the town to be repaired, &c.: and the 47th section appears to me to give the commissioners the power of deciding, when any new street is dedicated to the public, whether it shall become one of the public highways repairable by them within the Act of Parliament. It enacts, "that, when any new streets, squares, crescents, lanes, ways, or passages, shall be laid out and made in the said town of Leamington Priors, and the footpaths and carriage-roads thereof shall be well and effectually flagged, paved, stoned, gravelled, and put in good order and repair, to the satisfaction of the said commissioners, then, on application of the owner or owners of the soil, or of the owner or owners of the adjoining houses of such streets, or a majority of them, it shall be lawful for the said commissioners, and they are thereby [\*144 \*empowered and required, from time to time, *by writing under their hands, to declare the same to be public highways and passages*; and, from and after such declaration made, such new streets, squares, crescents, lanes, ways, and passages as aforesaid, and every of them, shall be deemed and taken to be public highways and passages to all intents and purposes, and be repaired by the said commissioners as the other parts of the streets, squares, crescents, lanes, ways, and public

passages within the said town are by this Act directed to be managed and governed." It is clear that the commissioners never did exercise the option of declaring the street in question to be a public highway within this section, and therefore they never became liable to repair it under section 26. The parish, however, might continue liable for the repair, notwithstanding this auxiliary liability on the part of the commissioners, unless there were words in the Local Act exempting them from the ordinary liability to repair highways: and I think there are words in the Act which exempt the parish from that ordinary liability. This exemption arises, in my opinion, from the power to impose rates, which is conferred upon the commissioners by the 128th section. By that section the commissioners are empowered to raise a fund by the imposition of a rate upon the tenants or occupiers of all property within the town in certain proportions. And the 27th section,—upon which my judgment turns,—enacts, that, "from and after the 11th of October, 1825, all and every persons and person who shall be assessed under or by virtue of this Act for or in respect of any messuages, lands, tenements, or hereditaments in the said town, shall be, and they, he, and she are and is hereby exonerated, released, and for ever discharged from the performance of statute duty for the repairs of the public highways \*145] within the said \*town, and from the payment of any composition money in lieu of such statute duty, and from all rates and assessments for the repairs of the said highways in the said town, for or in respect of such messuages, lands, tenements, or hereditaments." It seems to me that that amounts to an exemption of the parishioners within that town from the ordinary liability to highway-rates. The commissioners acting under the Local Act have made rates: it is to be presumed that they have made them properly; and, if so, every occupier, of any rateable property within the town has been rated, and therefore is exempted from the ordinary highway-rate. Inasmuch as the Local Act here does contain an express clause exempting rated inhabitants from parochial liability, the case differs from those relied on by Mr. Quain, in which it was held that, local commissioners having power to repair, their duty so to do did not exempt the inhabitants from the ordinary burthen, because there were no words of exemption in the Acts of Parliament under which the commissioners were acting. I have listened attentively to the argument urged by Mr. Quain as to the danger and difficulty which might accrue to the public if a highway which was to be considered as a highway for all practical purposes should be left without any one being bound to keep it in repair. But I think the legislature have considered that to be by no means an insurmountable difficulty: for, in the General Highway Act, 5 & 6 W. 4, c. 50, there is a general enactment applicable to all highways throughout the country,—the 23d section of that statute enacting "that no road or occupation way made or hereafter to be made by and at the expense of any individual or private person, body politic or corporate, nor any roads already set out or to be hereafter set out as a private drift-way or \*146] horse-path in any award of commissioners under an \*enclosure Act, shall be deemed or taken to be a highway which the inhabitants of any parish shall be compellable or liable to repair, unless the person, body politic or corporate, proposing to dedicate such highway to the use of the public shall give three calendar months' previous

notice in writing to the surveyor of the parish of his intention to dedicate such highway to the use of the public, describing its situation and extent, and shall have made or shall make the same in a substantial manner, and of the width required by this Act, and to the satisfaction of the said surveyor and of any two justices of the peace of the division in which such highway is situate, in petty sessions assembled, who are hereby required, on receiving notice from such person or body politic or corporate, to view the same, and to certify that such highway has been made in a substantial manner, and of the width required by this Act, and at the expense of the party requiring such view, which certificate shall be enrolled at the quarter sessions holden next after the granting thereof; then and in such case, after the said highway shall have been used by the public, and duly repaired and kept in repair by the said person, body politic or corporate, for the space of twelve calendar months, such highway shall for ever thereafter be kept in repair by the parish in which it is situate." And it appears to me that there may be very good reason for this. Under the Local Act, the commissioners are empowered, when any new street has been well and effectually flagged, paved, stoned, gravelled, and put in good order and repair to their satisfaction, on the application of the owner of the soil, by writing under their hands to declare the same to be a public highway under the provisions of the Act. The Act was passed with reference to the requirements of a rising town, where new streets are continually being formed: the \*object of the enactment was to compel the builders at their own expense to make a perfect street by paving, flagging, chan- [\*147 nelling, and sewerage, instead of leaving a mere strip of ground, and thus casting upon others the first expense of its formation. The commissioners are bound to see that all this has been properly done before they accept the dedication and charge the rates with the cost of keeping the new street in repair. I therefore think this Court will be giving effect to the intention of the legislature in holding that the adjudication of the justices was wrong, and that the matter be remitted to them pursuant to the reservation in the case.

WILLES, J.—I entirely concur in the construction which my Lord has put upon the statute.

BYLES, J.—I am of the same opinion, though I must confess that I at first entertained some difficulty. But, as to the 27th section of the Local Act, I think it is quite clear, that, when the Act of Parliament has taken away from the parish the means of performing the obligation of repairing, the effect is the same as if it had said in express terms that they shall no longer be liable to repair. The 26th section of the Act makes the commissioners' assigns of that liability as to present and future streets, subject to the condition contained in s. 47. On full deliberation, it seems to me that that will be found to be the true construction of the Act of Parliament.

*Lloyd* intimated that he was instructed not to ask for costs.

Judgment accordingly.

**\*148] \*HILL v. THE GREAT WESTERN RAILWAY COMPANY.**  
*April 23.*

In an action by a superintendent against a Railway Company for improperly dismissing him from their employ,—Held, that the plaintiff was entitled to have an inspection of all minutes or entries in the Company's books having any reference to the plaintiff's employment.

THIS was an action against the Great Western Railway Company for improperly discharging the plaintiff from their employ.

The declaration contained a count alleging that the plaintiff, at the defendants' request, entered into their employment and service as a superintendent on their railway for one whole year from a day then elapsed, and so from year to year to the end of each year commenced while the plaintiff should be so employed by the defendants, at a salary of 250*l.* a year, and a further sum of 35*l.* a year, in lieu of a house, to be paid by the defendants, and coal and candles for the plaintiff's domestic use to be supplied to him; and that, although the plaintiff was willing to continue in the defendants' employ, yet the defendants had hitherto wholly refused to continue the plaintiff in their employ.

To this declaration the defendants pleaded,—first, that they did not promise as alleged,—secondly, that they did not discharge the plaintiff as alleged,—thirdly, that the plaintiff was not willing to continue in the employ of the defendants as alleged; on which issue was joined.

The plaintiff having obtained a judge's order for the inspection of the "resolution and other books and writings of the defendants containing any minutes or entries with reference to the plaintiff's engagement by them,"

*Raymond* moved to rescind or vary it, on the ground that the defendants reasonably objected to a discharged servant having access to to their books.

**\*149] \*WILLES, J.**—The defendants may close up all those parts of the books which do not relate to the plaintiff's engagement. Subject to that restriction, the plaintiff is entitled to what he asks.

The rest of the Court concurring, *Raymond* took nothing.

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**FRAYES and Another v. WORMS.** *April 26.*

A plea of judgment recovered in a foreign Court of competent jurisdiction must show that the judgment so recovered is final and conclusive between the parties according to the law of the place where such judgment is pronounced.

THIS was an action for money payable by the defendant to the plaintiffs for certain general average due and payable by the defendant to the plaintiffs for and in respect of divers goods, merchandise, and chattels of the defendant carried and conveyed by the plaintiffs in and on board a certain ship of the plaintiffs called the *Hibernia* on a certain voyage for the defendant at his request, and for and in respect of certain losses, damages, and expenses incurred by the plaintiffs in and about the preservation of the said ship and cargo and the said goods, merchandise, and chattels from damage and loss during such last-mentioned voyage; and also for certain other general average due and pay

able by the defendant to the plaintiffs for and in respect of certain money paid by the defendant to the plaintiffs before the completion of the said voyage, by way of advance and part payment of the freight for the goods thereinbefore mentioned, on the said voyage, and for and in respect of certain losses, damages, and expenses incurred by the plaintiff in and about the preservation of the said ship and cargo, goods, and \*freight from damage and loss during the said voyage; and [\*150 for money paid by the plaintiffs for the defendant, at his request; and for money found to be due from the defendant to the plaintiffs upon accounts stated between them: Claim, 1500l.

Fourth plea,—that, after the accruing of the said causes of action, the plaintiffs by their agent in that behalf, to wit, one William James, acting for them and with their approval, in parts beyond the seas, to wit, San Francisco, in California, being the place of the termination of the voyage in the declaration mentioned, impleaded one Abel Guy, then and there being the agent and representative of the defendant, and on behalf of the defendant, and acting in this matter for the defendant, in a Court of competent jurisdiction there, to wit, the District Court of the United States for the Northern District of California, and which Court then had jurisdiction over the said parties respectively, and over the causes of action in the declaration mentioned, and the causes of action submitted to the said Court; and that the plaintiffs by their said agent so impleaded the said Abel Guy of and for the very self-same causes of action as in the declaration mentioned, and the same then and there in the said Court came on to be heard and decided, and were heard and decided, and judgment given by the said Court therein in favour of the said Abel Guy and of the defendant.

To this plea the plaintiffs demurred, the grounds of demurrer stated in the margin being,—“that a foreign judgment is no bar to an action here; that a judgment in favour of a third person is not pleadable as an estoppel by the defendant; and that the plea does not show that the judgment proceeded on grounds which by the Californian law would preclude the plaintiffs from suing again.” Joinder.

\**Honyman*, in support of the demurrer.(a)—This is not an action between persons who were either parties or privies to the [\*151 proceeding in the Court at San Francisco. [BYLES, J.—There is a positive allegation (which is not traversed) that Guy was the agent and representative of the defendant, and acting for him in the matter in question in a Court of competent jurisdiction.] That amounts to no more than an allegation that Guy was the defendant's agent. Suppose the decision of the Court at San Francisco was that Guy was not personally liable,—why should we not sue the defendant here? There is a

(a) The points marked for argument on the part of the plaintiffs were as follows:—

“That the judgment pronounced in the District Court of the United States in California is no bar to an action here for the same cause of action:

“That it appears by the plea that the former action was against Abel Guy, and that the judgment in that action is not pleadable as an estoppel by the defendant, who was no party thereto:

“That it does not appear by the plea that the judgment was final, even between the parties, according to the law of California, and consequently it is no bar here:

“That it does not appear that the judgment proceeded on grounds which by the Californian law would preclude the bringing of another action:

“And that it is consistent with the plea, that the judgment proceeded on the ground that the said Abel Guy was not liable to be sued in respect of the matters forming the subject of the present action.”

further and a fatal objection to the plea, viz., that it does not allege that the judgment in the Court in San Francisco was final and conclusive there. In *Plummer v. Woodburne*, 4 B. & C. 625 (E. C. L. R. vol. 10), 7 D. & R. 25 (E. C. L. R. vol. 16), to a declaration in assumpsit for money had and received, money paid, commission, &c., the defendant pleaded that the plaintiff had impleaded the defendant in a plea of trespass on the case upon promises in a Court of judicature in the island of St. Christopher's for the same causes of action as those mentioned in the declaration, that the defendant pleaded non assumpsit, upon which issue was joined, and the jury found for the defendants with one penny costs, that judgment was given for the defendant upon that verdict, and that that judgment was afterwards affirmed, first, by a Court of error in the island, and afterwards by the King in council: it was held that this plea was bad, inasmuch as it did not appear that the judgment at St. Christopher's was final and conclusive in the colony itself, so as to bar the plaintiff from another action there. And see *Smith v. Nicolls*, 5 N. C. 208 (E. C. L. R. vol. 35), 7 Scott 147. [ERLE, C. J.—*Plummer v. Woodburne* seems to be in point. There is no allegation here that the judgment in the Court of San Francisco, assuming it to be in a proceeding between the same parties, was final and conclusive.]

*Milward*, contra. (a)—The plea discloses a good answer to the action. In *Barber v. Lamb*, 8 C. B. N. S. 95, a plea of judgment recovered in an action brought in the consular Court at Constantinople, established under the statute 6 & 7 Vict. c. 94, was held to be a good bar to an action brought here for the same cause. [WILLES, J.—There the proceeding in the consular Court was between the same parties, and the defendant paid the amount under it.] The principle of the decision was, that the plaintiff had selected his own tribunal, and was therefore bound by its decision, by analogy to cases of reference to arbitration. So, here, the parties have selected the Californian Court, and must be content to be bound by the decision of the tribunal of their choice, and cannot be allowed, when they find the decision against them, to repudiate the proceeding. [ERLE, C. J.—It does not appear that the judgment in the Californian Court was a judgment on the merits; nor does it appear that by the law there administered the decision was final.] The same answer may be given as was given by Keating, J., in *Barber v. Lamb*, viz., that, if there was anything to deprive the Californian Court of jurisdiction over the subject-matter, or to deprive the judgment of validity, that might have been shown by way of replication.

PER CURIAM.—There is a marked distinction between this case and that of *Barber v. Lamb*, as has been already pointed out. We think the plaintiffs are entitled to judgment.

#### Judgment for the plaintiffs.

(a) The points marked for argument on the part of the defendant were as follows:—

“That the plaintiffs having themselves already submitted the same complaints and matters to a Court having jurisdiction over the same, and having elected that tribunal to decide the same, and judgment having been given against them, they cannot again raise the same matter in an action here:

“That the judgment of the foreign Court as pleaded operates as an estoppel against the plaintiffs in setting up the present claims:

“And that the second count of the declaration is bad, as no average can attach in respect of advances on account of freight; and the second count shows no ground of action.”

**\*CAHILL v. THE LONDON AND NORTH WESTERN RAILWAY COMPANY. April 26. [\*154**

By their Act of Parliament and their published notices a railway Company were bound and professed to allow each passenger to take with him his ordinary luggage, not exceeding a given weight, without any charge for the carriage. The plaintiff, a passenger by the railway,—who was found to have had no knowledge of the Act of Parliament or the notice,—brought with him as luggage a box containing *only merchandise*, but not exceeding in weight the limit prescribed for personal luggage. On the box was written in large letters the word "Glass." No information was given by the plaintiff to the Company's servants, nor was any inquiry made by them, as to the contents of the box:—

Held, in an action against the Company for the loss of the box, that, inasmuch as it contained merchandise only, and not personal luggage, there was no contract on the part of the Company to carry it, and consequently they were not liable for the loss.

And *semble*,—per Erle, C. J., and Willes, J.,—that the provisions of the Act of Parliament as to the gratuitous carriage of the personal luggage of passengers must be taken to have been known to the plaintiff.

THIS was an action brought to recover the sum of 74*l.* 13*s.* 4*d.*, the value of a box and its contents lost under the circumstances hereinafter mentioned.

The declaration stated, that the defendants were the owners and proprietors of a certain railway called the London and North Western Railway, and of certain trains and carriages used by them for the carriage and conveyance of passengers and their luggage, goods, and chattels, in and upon and along the said railway, for hire and reward to them the defendants in that behalf; and thereupon the plaintiff, at the request of the defendants, became and was a passenger, and was upon such request received by the defendants as such passenger, in one of the said carriages of the defendants, together with his luggage, goods, and chattels, to be by them safely and securely carried and conveyed upon the said railway, together with his said luggage, goods, and chattels, on a certain journey, that is to say, from Northampton to London, for reward therefor paid by the plaintiff to the defendants in that behalf; Yet the defendants, not regarding their duty in that behalf, did not use due and proper care in and about the carriage and conveyance of the plaintiff's said luggage by and upon the said railway from Northampton aforesaid to London aforesaid, but wholly neglected so to do, and by their carelessness, negligence, and improper conduct in the premises, the defendants wrongfully lost the said luggage of the plaintiff: Claim 100*l.*

\*The defendants pleaded,—first, not guilty,—secondly, that the plaintiff was not received by the defendants, together with his said luggage, goods, and chattels, on the terms and for the purposes in the declaration mentioned, as alleged,—thirdly, as to part of the said luggage, that the said part of the said luggage consisted of silks within the meaning of the Act thereafter mentioned, and was contained in one package, and exceeded in value the sum of 10*l.*, and that the said part of the said luggage in the said package was after the 23d of July, 1830, and after the coming into effect of the Act of Parliament passed on that day relating to carriers, and commonly known as the Act of the 11th year of King George the 4th and the 1st year of King William the 4th, c. 68, delivered by the plaintiff to the defendants, then being common carriers by land for hire, to accompany the person of the

plaintiff as a passenger in a train of carriages of the defendants of which the carriage in the declaration mentioned was one, such train then being a public conveyance; and that the receipt of the said luggage by the defendants as in the declaration mentioned was by reason of such delivery, and not otherwise; and that such delivery was made to a certain servant of the defendants; and that, at the time of such delivery, the value and nature of the said luggage was not declared by the plaintiff, then being the person delivering the same; and that they the defendants lost the said luggage, which is what in the declaration is complained of; and that such loss was a loss within the meaning of the said Act,—fourthly, that the defendants are the corporation incorporated by the 9 & 10 Vict. c. cciv., intituled “An Act to consolidate the London and Birmingham, Grand Junction, and Manchester and Birmingham Railway Companies;” that the railway in the declaration mentioned is \*156] the railway in the said Act mentioned; that \*the plaintiff delivered the said luggage to the defendants as his the plaintiff’s ordinary luggage allowed by the said Act to be by him taken without any charge being made for the carriage, and upon the terms in the declaration mentioned; and the defendants received the said luggage as such ordinary luggage, and upon the said terms, and not otherwise, and, on the supposition that the same was such ordinary luggage as aforesaid, made no charge for the carriage of the same; that the said luggage was not such ordinary luggage, but, on the contrary thereof, consisted of certain articles of merchandise, as the plaintiff at the time when he delivered the said luggage to the defendants well knew; that the defendants, before and at the time of the delivery of the said luggage to them, were common carriers of passengers and goods for hire by land, as the plaintiff well knew; that the plaintiff became such passenger with the said luggage to be carried by the defendants as such common carriers as aforesaid, and they as such common carriers received him with his said luggage to be carried as aforesaid; that the defendants did all things necessary to entitle them to have the plaintiff at the time of delivering the said luggage to the defendants declare the said luggage to be such articles of merchandise, and not to be such ordinary luggage as aforesaid, and to have the same delivered to them by the plaintiff on the terms of being paid by the plaintiff for the carriage of the same; that the plaintiff did not deliver the said luggage to the defendants as such articles of merchandise, and did not declare or communicate to the defendants or give them notice that the said luggage, or any part thereof, was not ordinary luggage, and did not pay the defendants for the carriage of the same, or any part thereof; and that the defendants, at the time of receiving the \*157] said luggage as \*aforesaid had no notice that the said luggage, or any part thereof, consisted of such articles of merchandise as aforesaid, or was not such ordinary luggage as aforesaid. Upon these pleas issue was joined.

The cause came on to be tried before Cockburn, C. J., at the sittings in Middlesex after last Trinity Term, when a verdict was found for the plaintiff, for 74*l.* 13*s.* 4*d.* damages, and 40*s.* costs, subject to the opinion of the Court upon the following case:—

The plaintiff is a commercial traveller in the employment of Mr. Eugene Rimmel, the perfumer, of 96 Strand, London. The defendants

are the London and North Western Railway Company, incorporated by that name and style under the 9 & 10 Vict. c. cciv., and carry on the business of common carriers of goods and passengers for hire on their line of railway, called the London and North Western Railway, from Northampton to London.

On the 16th of December, 1857, the plaintiff, being then in the employ of the said Mr. Rimmel in the capacity aforesaid, and at Northampton on one of his journeys as his commercial traveller, had occasion to proceed from Northampton to London by the defendants' railway. He accordingly proceeded to the defendants' station at Northampton by a public omnibus, accompanied by his luggage, which consisted of a box about three feet long by eighteen inches wide and twelve inches deep (with which he ordinarily travelled on such journeys), and two other packages.

This box was covered with a black leather case which had painted on the top of it in the centre, lengthways, the name of "M. Rimmel" in white letters about two inches long; and it had painted across the top on each end the word "Glass," also in white letters about two inches long, and had round it two black leather straps between the words "Glass."

\*This box the plaintiff had placed on the outside of the said omnibus; and, on his arrival at the said station at Northampton, [\*158 the same was handed down from the omnibus and given to one of the porters of the defendants on duty at the station.

The porter took the box and put it on a barrow with other luggage, and wheeled it to and placed it on the up-platform of the railway for the purpose of putting it into the luggage-van of the train by which the plaintiff was about to proceed to London.

On getting into the train at Northampton, the plaintiff saw one of the Company's porters about to place his box in the luggage-van of the train. On the arrival of the train at Blisworth station, where the line from Northampton joins the defendants' main line of railway, the passengers from Northampton for London with their luggage, and amongst them the plaintiff and his luggage, had to change carriages for London, and to get into another train which was coming up on the said main line; and, whilst waiting there for the last-mentioned train to come up, the plaintiff saw his said box on the platform ready to be put into it. On the arrival of the train in London, the plaintiff's box could not be found, and has not since been heard of.

The plaintiff took a second-class ticket as a passenger from Northampton to London, and paid the ordinary fare. This box did not exceed the weight of luggage allowed by the defendants to passengers to accompany them; and no sum was paid in respect thereof. No question was asked by any of the Company's servants respecting the said box, nor was any demand made for any payment for the carriage thereof; and no information was given by the plaintiff as to its contents. It is a common practice to put the word "glass" upon boxes which do not contain that article.

\*When the plaintiff took his ticket and became a passenger [\*159 as above mentioned, a notice was affixed in legible characters in a public and conspicuous part of the defendants' booking-office at the Northampton station, stating the increased rates of charges required to

be paid over and above the ordinary rate of carriage as a compensation for the greater risk and care to be taken for the safe conveyance of the valuable articles therein mentioned, which were the same as those specified in the 1st section of the Carriers' Act, 11 G. 4 & 1 W. 4, c. 68, amongst which were included silk in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials, contained in any parcel or package delivered to accompany the person of any passenger, where the value thereof exceeded the sum of 10l.

The plaintiff did not declare the nature or value of any of the contents of his said box.

By the 66th section of the first-mentioned Act of Parliament, it is enacted that any passenger travelling upon the railway in a first-class carriage may take with him his ordinary luggage not exceeding 112lbs. in weight, and every passenger travelling in a second-class carriage may take with him his ordinary luggage not exceeding 60lbs. in weight, and every passenger travelling in a third-class carriage may take with him his ordinary luggage not exceeding 40lbs. in weight, without any charge being made for the carriage.

The following notice relating to luggage was published in the timetable of the Company:—

“Luggage. First-class passengers are allowed 112lbs., second-class passengers 100lbs., and third-class passengers 56 lbs. of personal luggage (not being merchandise or other articles carried for hire or profit), free of charge. All excess will be charged for, according to distance.

\*160] In order to prevent delay and \*inconvenience in the re-delivery of luggage at the end of the journey, passengers are requested to place on each article their name and address: and notice is hereby given that the Company will not be responsible for the care of the same unless fully and properly addressed with the name and destination of the party, nor for any article conveyed inside the carriages.”

The plaintiff had no knowledge of the said notice or statute.

The contents of the said box consisted partly of samples of articles sold by Mr. Rimmel as a perfumer, and partly of other articles to be used by the plaintiff as samples, a portion of which he was at liberty to sell if required by the customer. The following is a list of such contents, with their value:—

			£	s.	d.
2	pieces of English galloon for wigs, at	3s. per piece	0	6	0
25	“ of French ribbon for ditto	1s. 6d. “	1	17	6
9	“ “ “ “	1s. 9d. “	0	15	9
10	“ “ “ “	2s. “	1	0	0
4	“ “ “ “	2s. 6d. “	0	10	0
4	“ “ “ “	3s. “	0	12	0
3	“ “ “ “	3s. 6d. “	0	10	6
1	“ “ “ “	4s. “	0	4	0
1½	doz. of silk cauls for wigs	18s. per doz.	1	7	0
3	“ of wig crowns	24s. “	3	12	0
6½	oz. of French sewing silk,	3s. 6d. per oz.	1	3	8
½	“ of English webbing	2s. 6d. “	0	1	3
66	inches of hair lace foundation, for partings	10d. per inch	2	15	0
102	“ of French skin partings for ladies' wigs	10d. “	4	5	0
89	“ of silk	8d. “	3	6	9
½	doz. French skin crown partings for gents	7s. each	2	2	0
4	“ sheets of French skin for partings	10s. per doz.	2	0	0

		£.	s.	d.
12 doz. steel wig-snaps and elastics for gents	2s. per doz.	1	4	0
1 lb. of Ringlet hair	28s., 36s. each	3	4	0
1 " of cross hair for gents' wigs	32s. per lb.	1	12	0
3 yards of net silk partings	14s. per yard	2	2	0
7 " of crown silk wig-net	7s. "	2	9	0
1 " of French gauze for partings	14s. "	0	14	0
3½ " of silk wig-net	14s. "	2	9	0
2½ " " "	9s. "	1	0	3
2 lbs. of straight human hair	25s. per lb.	2	10	0
15½ inches of skin parting (English)	9d. per inch	0	11	9
1 lb. of straight human hair	32s. per lb.	1	12	0
2 lbs. of " "	36s. "	3	12	0
16 inches of gauze parting	1s. 4d. per inch	1	1	4
1 doz. circular india rubber dressing combs, each	16s. 18s. per doz.	1	14	0
1 " india rubber dressing combs	14s. 19s. "	1	13	0
½ " " " "	13s., 15s., 21s. "	1	4	6
38½ inches hair net for partings	9d. per inch	1	8	11
76 " of union	7d. "	2	4	4
2 doz. tortoise-shell side-combs	6s. per doz.	0	12	0
4 " " "	8s. "	1	12	0
3½ " " "	10s. "	1	17	6
1½ " " "	12s. "	0	18	0
23 " " "	14s. "	1	6	10
½ " " " each	17s. 18s. "	0	17	6
5½ yards of silk wig-net	4s. per yard	1	2	0
11½ inches French gauze partings	1s. per inch	0	11	6
10½ doz. shell braid combs	8s. per doz.	4	6	0
Nail brushes, sample card		0	10	0
Dressing-case		0	9	6
Travelling-case, containing the above		1	10	0
		<hr/> £74 13 4 <hr/>		

"Some of the above articles were in glass cups; and there were also some glass bottles, and a looking-glass in the dressing-case. [\*162

The Court was to be at liberty to draw all inferences from the above facts which a jury might properly draw, and say for what amount the verdict should be entered, if the plaintiff was entitled to recover.

The question for the opinion of the Court was, whether the plaintiff was entitled to recover for the loss of the said box and its contents, or any part thereof.

If the Court should be of opinion in the affirmative, then the verdict was to be entered for the plaintiff for such amount as the Court should direct, with costs of suit. If the Court should be of opinion that the plaintiff was not entitled to recover, then the verdict was to be entered for the defendants, with costs of defence.

*Lush Q. C.* (with whom was *Beasley*), for the plaintiff.(a)—It is found

(a) The points marked for argument on the part of the plaintiff were as follows:—

"1. That the luggage in question was the ordinary luggage of the plaintiff:

"2. That the defendants, when they accepted the plaintiff as a passenger, with his said box, knew and could see that the same was merchandise:

"3. That the plaintiff's box was obviously and patently merchandise, and not passenger's luggage, and the defendants must have known it to be such:

"4. That the defendants ought to have objected to receive the said box when the plaintiff brought it forward as his luggage to accompany him as a passenger on his said journey:

"5. That the defendants ought not to have treated, as they did, the said box as the plaintiff's luggage to accompany him on his said journey:

"6. That the plaintiff's said luggage appeared externally to be merchandise, and that the character of the box could not have deceived the defendants:

\*163] as a fact in the case that the \*plaintiff had no knowledge either of the notice or of the Act of Parliament: and it is impossible under the circumstances to say that the defendants did not receive the box in question as luggage.

*Phipson*, for the defendants.—The fourth plea is proved by the facts set forth in the special case. The only contract which the defendants entered into with the plaintiff, was a contract for the safe conveyance of himself and his ordinary luggage. The box in question was not ordinary luggage, but merchandise; and there was nothing to indicate that it was a package of that description. Under the Carriers Act, 11 G. 4 & 1 W. 4, c. 68, it was held, in *Owen v. Burnett*, 2 C. & M. 353,† that, to entitle a party to recover for loss of or injury to any article of the description mentioned in s. 1 of that Act, he must give express notice to the carrier of the value and nature of the article. There, a looking-glass exceeding the value of 10*l.* was packed in a case sent to a carrier's office to be conveyed from London to the house of one S., near Lymington. A notice was fixed up in the office, pursuant to s. 2 of the Carriers Act. The words "Plate-glass," "Looking-glass," "Keep this edge upwards," were written on the case, but no declaration was made of the nature and value of the article, and no increased rate of carriage was paid. The parcel was conveyed from Lymington \*164] to \*the place of its ultimate destination on a brewer's truck, that being the usual mode in which parcels were conveyed in that part of the country. When the glass was unpacked, it was found to be broken: and it was held that the carrier (in the absence of proof of gross negligence) was not liable for the damage. Bayley, B., there says: "It seems to me that the object of the Act is twofold,—first, it is that the party receiving the article may be apprised of the nature of the article, in order that he may give it the greatest degree of protection,—and, secondly, that, as he incurs an additional danger or risk, he should have an increased compensation. It seems to me, then, that, by the terms of the Act, the plaintiff was required to give a specific notice that the package contained glass of the value he seeks to recover, and that, as he did not do that, the defendant was not responsible." In *The Great Northern Railway Company, app., Shepherd, resp.*, 8 Exch. 30,† it was held that a carrier of passengers for hire was, at common law, only bound to carry their *personal* luggage; and therefore, that, if a passenger has merchandise among his personal luggage (as, in that case, 124 dozen ivory knife-handles), or so packed that the carrier has no notice that it is merchandise, he is not responsible for its loss: but that, if the merchandise is carried openly, or so packed that its nature is obvious, and the carrier does not object to it, he will be liable. Parke, B., there says: "No doubt, it is the duty of the carrier, on receiving the parcel, to ask such questions as may be necessary, and if he asks no questions, and there be no fraud, he is liable for its loss. It was so laid down in *Walker v. Jackson*, 10 M. & W.

"7. That the defendants made no inquiry of the plaintiff as to the nature of his said luggage, or the contents of the said box, and made no objection to receive it as his luggage to accompany him on his journey:

"8. That no part of the contents of the said box was silk within the meaning of the Carriers Act:

"9. That the defendants are responsible to the plaintiff for their negligence in having lost his luggage in the manner stated in the case."

161.† But in this case the contract was, to carry passengers and their luggage. Then, if the Company had notice that a passenger brought with him goods which were not luggage, and they chose to carry \*them, they would be responsible: but if no notice is given, [\*165 there is an unfair concealment, which prevents them from making a charge as for merchandise." That doctrine is precisely applicable here. In Story on Bailments, § 498, it is said: "The proprietors of stage-coaches whose employment is solely to carry passengers (such as hackney-coachmen) are not deemed common carriers, although as to the luggage or baggage of the passengers they may incur the same liability as common carriers.(a) If (as is ordinarily the case) they are also accustomed to carry the baggage of passengers, although they receive no specific compensation therefor, but simply receive their fare for the passage of the travellers, yet, like common carriers, they are responsible for the safety of such baggage, and for the proper care thereof, since it constitutes a part of the service for which the fare is paid, and the passengers are thereby induced to travel in the coach, and the custody of the luggage may be properly deemed, as in the case of an innkeeper, an accessory to the principal contract." Again, in § 499, it is said: "It has been a matter of some controversy in what character the proprietors of stage-coaches and steamboats and rail-cars are to be regarded \* \* \* The more important question has been in regard to the liability for the baggage of passengers,—whether it is that of common carriers, or only that of private persons engaging ordinarily for hire, that is, for due and reasonable skill and diligence in their undertaking. The general tendency of the authorities, however, has at all times been to the point, that, as to the baggage of passengers, the proprietors are common carriers. And the doctrine seems now firmly established, both in England and in America, that the \*responsibility of coach proprietors [\*166 carrying passengers with their baggage, stands, as to their baggage, upon the ordinary footing of common carriers. Mr. Bell has deduced this as the true modern doctrine on the subject.(b) But by baggage we are to understand such articles of necessity or personal convenience as are usually carried by passengers for their personal use, and not merchandise or other valuables, although carried in the trunks of passengers, which are not designed for any such use, but for other purposes, such as a sale, and the like. But it has been said, that, although passenger carriers are not liable for merchandise when packed up with travellers' baggage, if the baggage be lost, yet, if the merchandise be so packed as to be obviously merchandise to the eye, and the carrier takes it without objection, he is liable for the loss." The same doctrine is to be found in Angell on Carriers, p. 117. Independently of the Act of Parliament, the defendants profess to carry free of charge a certain amount of personal luggage with every passenger. They do not contract at all with one who brings with him merchandise, without any intimation to them that what he brings is not personal luggage. Moreover, the plaintiff is bound by the provision in the Company's Act, 9 & 10 Vict. c. cciv., which entitles each passenger to have a given amount of luggage carried free of charge. It was not necessary that he should

(a) See *Ross v. Hill*, 1 C. B. 877 (H. C. L. R. vol. 50).

(b) See 1 Bell Comm. 5th edit. pp. 467, 468, 475.

have actual notice of the Act: *The Edinburgh and Dalkeith Railway Company v. Wauchope*, 8 Clark & Fin. 710. The Act contains the usual clause declaring it to be a public Act, and that it shall be judicially noticed as such. Those, at all events, are bound by the Act, who avail themselves of the privileges conferred by it. The fact that the defendants' servants \*might have known from the appearance of the \*167] package, or might have ascertained by inquiry, that it contained other than the personal luggage of the passenger, makes no difference. In *Marsh v. Horne*, 5 B. & C. 322 (E. C. L. R. vol. 11), 8 D. & R. 223 (E. C. L. R. vol. 16), a common carrier gave public notice that he would not hold himself accountable for any parcel above the value of 5*l.*, if lost or damaged, unless the same were entered as such and paid for accordingly when delivered. A person who knew that the carrier had given this notice delivered him a parcel containing such goods (much exceeding the value of 5*l.*), to be carried from L. to B., and the carrier accepted them for that purpose. The price of the carriage was not then paid. The carrier knew that the parcel contained goods much exceeding the value of 5*l.* The parcel was lost: and it was held that the carrier was not responsible. Abbott, C. J., in delivering the judgment of the Court, said: "In the case of *Levi v. Waterhouse*, 1 Price 280, it was proved that the carrier's servant who received the parcel knew the value of its contents; but Gibbs, C. J., before whom the cause was tried, held that the mere knowledge of the value did not take the case out of the general rule; and his opinion was confirmed by the Court of Exchequer, after argument and consideration, and the rule which had been obtained for setting aside the verdict was discharged."

*Lush*, in reply.—The cases cited are entirely distinguishable from the present. In each of them the carrier had given a notice, which was brought home to the owner of the goods, that he would not hold himself liable beyond a certain amount, unless the value of the parcel was declared and an increased rate of carriage paid. The effect of the contract was to absolve the carrier from a loss arising from ordinary \*168] \*negligence. That brings it within the rule laid down in *Walker v. Jackson*, 10 M. & W. 161,† where Parke, B., says: "I take it now to be perfectly well understood, according to the majority of opinions upon the subject, that, if anything is delivered to a person to be carried, it is the duty of the person receiving it to ask such questions about it as may be necessary: if he ask no questions, and there be no fraud to give the case a false complexion, on the delivery of the parcel, he is bound to carry the parcel as it is. It is the duty of the person who receives it to ask questions; if they are answered improperly, so as to deceive him, then there is no contract between the parties; it is a fraud, which vitiates the contract altogether." Here there is nothing to exempt the defendants from the ordinary common-law liability of carriers, apart from the provision in the Act of Parliament, of which it is found that the plaintiff had no knowledge. In *Story on Bailments*, § 498, speaking of proprietors of stage-coaches, it is said: "If (as is ordinarily the case) they are also accustomed to carry the baggage of passengers although they receive no specific compensation therefor, but simply receive their fare for the passage of the travellers, yet, like common carriers, they are responsible for the safety of such baggage, and for proper care thereof." [BYLES, J.—In the following section *Story*

says: "By *baggage* we are to understand such articles of necessary or personal convenience as are usually carried by passengers for their personal use, and not merchandise or other valuables, although carried in the trunks of passengers, which are not designed for any such use, but for other purposes, such as a sale, and the like." In *The Great Northern Railway Company, app., Shepherd, resp., 8 Exch. 37*,† Parke, B. says: "No doubt it is the duty of the carrier, on receiving the parcel, to ask such questions as may \*be necessary; and, if he ask no questions, and there be no fraud, he is liable for its loss. It was so [\*169 laid down in *Walker v. Jackson*." Here, there was no fraud, and no misrepresentation on the part of the plaintiff either by word or by conduct. [BYLES, J.—Baron Parke goes on to say, that, "if the Company had notice that a passenger brought with him goods which were not luggage, and they chose to carry them, they would be responsible; but, if no notice is given, there is an unfair concealment, which prevents them from making a charge as for merchandise." In that case, the package to all outward appearance consisted only of personal luggage: and in giving judgment the learned Baron says,—"The defendants only agreed for the stipulated fare to carry passengers and everything which constituted personal luggage, and were not bound to carry merchandise, or articles wholly unconnected with luggage. If, indeed, they had notice, or might have suspected from the mode in which the parcels were packed, that they did not contain personal luggage, then they ought to have objected to carry them: but the case finds that they had no notice of what the packages contained. Whether this was done for any fraudulent purpose, it is not necessary to inquire; because, even if there were no fraudulent intent, the plaintiff had so conducted himself that the Company were not aware that he was not carrying luggage, and therefore the loss, must be borne by him." That is exactly in accordance with what is laid down in *Walker v. Jackson*. Here, the general appearance of the package, and the intimation that it contained "glass," was enough to show that it was not "personal luggage," and to impose upon the servants of the Company the duty of inquiry. The circumstance of the Company's Act containing a clause declaring that it is to be taken notice of as a public Act, clearly does not make it any more binding upon strangers. The \*rule on this subject is thus stated in [\*170 *Dwarris on Statutes* 472: "Great inconvenience having been found to result from the strict proof required in the case of private Acts in some Acts of Parliament not relating to the kingdom at large, a special clause is often inserted declaring them to be public Acts, and that they shall be taken notice of as such without being specially pleaded; in which case they are to be proved in the same manner as public Acts; it is not necessary to prove them by an examined copy, or to show that the printed copy was printed by the King's printer. The clause referred to was intended for the facility of proof: it will not give the Act the effect of a public Act for other purposes, as, with regard to the recital of facts contained in it:" see *Brett v. Beales, M. & M. 129* (E. C. L. R. vol. 22).

ERLE, C. J.—I am of opinion that the defendants are entitled to judgment on this special case. The plaintiff, it appears, had taken a ticket to travel by the defendants' railway from Northampton to London; and he complains of a breach of duty on the part of the Company in

omitting to take due care of his luggage. From the statement in the case, it appears that the thing which was lost consisted of a package containing articles of merchandise only, and nothing which could fall within the description of personal luggage. The package in question is represented by a drawing in the special case, and appears to be a substantial box or case, on which was painted in letters about two inches long the word "Glass;" and it has been contended, on behalf of the plaintiff, that the general character and appearance of the package should have induced the Company's servants to make inquiry as to its contents, and fixed them with notice that they were other than personal luggage, and so they must be assumed to have consented to receive the \*171] \*package, knowing it to contain merchandise, upon the same footing as if it had consisted of personal luggage. The facts are stated for our opinion: and we are at liberty to estimate the effect of them. My opinion upon those facts is against the plaintiff. It seems to me that it would be introducing a most pernicious rule, to hold, that, if a package which from its appearance is likely to contain merchandise is brought to a railway by a passenger, the Company's servants are bound to inquire whether it consists of what is ordinarily understood to be personal luggage, or merchandise, at the peril of being held liable for a loss if loss occurs. I think it is most important as well for the public as for railway companies that the latter should be protected according to their reasonable regulations, and that they should be informed by the passengers of the contents of packages brought by them to be carried, if they are not of the description which by those regulations they are entitled to have carried free of charge. If the passenger wishes to carry merchandise, he should pay the Company a fair and reasonable compensation for it. The plaintiff is found by the case to have intended no fraud; and it is also found that he ordinarily travelled on his journeys with the box in question: and it may be that he never paid or was required to pay anything for the carriage of it. But the time has arrived at which it is to be ascertained at whose risk it was carried. I am of opinion that it was carried at the risk of the plaintiff, because it contained merchandise for the carriage of which the Company according to their Act of Parliament and their regulations were entitled to be paid, and not personal luggage which within certain limits they undertake to carry for passengers free of charge. It is said that the plaintiff had no express notice that he ought to have paid for the carriage \*172] of this box: but, on the \*other hand, the defendants had no express notice that it contained merchandise which they were entitled to charge for, and not personal luggage. What is the contract into which the railway Company enter when they receive a passenger with his luggage? Is it a contract to carry him safely together with anything which he may choose to bring with him and pass off as luggage, when in truth it is not luggage, but merchandise? I think there was no such contract. As was said by Parke, B., in *The Great Northern Railway Company, app., Shepherd, resp.*, 8 Exch. 37,† "The contract was, to carry passengers and their luggage. If the Company had notice that a passenger brought with him goods which were not luggage, and they chose to carry them, they would be responsible; but, if no notice is given, there is an unfair concealment, which prevents them from making a charge as for merchandise." It seems to me that that is

perfectly just. If the passenger so conducts himself towards the company as to prevent them from getting a fair remuneration for the carriage of merchandise, he may very well be held to have it carried at his own risk. I am clearly of opinion that there was no such contract by the Company to carry the plaintiff safely with the box in question as is set out in this declaration. I rest my judgment upon the authority of the case of *The Great Northern Railway Company, app., Shepherd, resp.* So far as to the common-law liability.

I am further of opinion, and, if need was, I should be prepared to hold, that, where a Company is created by Act of Parliament, having privileges and rights granted to them, and liabilities and duties imposed upon them, in respect of their incorporation, parties dealing with them must be taken to be cognisant of the provisions of the Act of Parliament granting those privileges and rights and imposing those duties and liabilities, although it be a private Act. If that doctrine be applicable to the present case, it would be the case of a person [\*173] who had notice that the Company carried a given amount of personal luggage with every passenger free of charge. It seems to me that this would by implication be a notice that they did not carry merchandise gratis; for, it would be idle for a railway Company or other common carrier to give notice that they do not intend to carry merchandise gratis. When, therefore, they give notice that they will, within certain limits, carry the passenger's *luggage*, "without any charge being made for the carriage," they impliedly give notice that they will not carry *merchandise* gratis. If my view of the effect of the Act of Parliament is correct, the present plaintiff had notice in law that the Company did not contract to carry the package in question without making a charge for the carriage of it. In either view, therefore, I think the plaintiff is not entitled to recover, the defendants not having entered into any such contract with him as he has alleged in his declaration.

WILLES, J.—I am of the same opinion. At first I inclined to think that the question for our consideration was somewhat different from that which Mr. *Phipson's* argument has satisfied me that it is. My impression was, that the Company must be assumed to have accepted the package in question to be carried for the plaintiff for hire, and that, having made no inquiry as to whether or not its contents consisted of personal luggage only, and no fraudulent concealment appearing on the plaintiff's part, the Company was responsible for its safe delivery at its destination. But I am now satisfied that the first proposition is unsustainable in point of fact, because, upon the facts which appear on the special case, I am of opinion that the \*Company never did accept [\*174] this package to be carried for hire,—that the true answer to the plaintiff's claim is, that there never was any contract on the part of the Company to carry the package which was lost. The only contract which they entered into with the plaintiff, was, to carry himself and his personal luggage not exceeding 100 lbs. in weight. I do not think it necessary to go into the question whether the Act of Parliament was binding upon the plaintiff or not, though, if it were necessary to decide that point, my present impression is the same as that which has been expressed by my Lord. But I think that, when a passenger takes a ticket at the ordinary charge, he must, according to common sense and common experience, be taken to contract with the railway Company for the carriage of him-

self and his personal luggage only; and that he can no more extend the contract to the conveyance of a single package of merchandise than of his entire worldly possessions. That is the view which is taken in Story on Bailments, §§ 498, 499, and also by Lord Wensleydale in *The Great Northern Railway Company, app., Shepherd, resp.*, 8 Exch. 30.† It is rather a conclusion of fact than of law, that the ticket entitles the party who purchases it to have himself and his personal luggage carried for the price he pays, and nothing more. In the absence, therefore, of some contract for the conveyance of that which does not answer the description of personal luggage, the plaintiff cannot be entitled to recover for its loss. Here, it is beyond question that the package of the loss of which he the plaintiff complains was not ordinary personal luggage: it follows therefore, as matter of reasoning, that, if he were entitled to have it carried for hire, it must be for hire other and beyond what was paid for the conveyance of the plaintiff and his personal luggage. It is \*175] contended on the part of the plaintiff that such a contract may be implied from the fact of the porter in the employ of the Company having from its external appearance an opportunity of seeing that the package contained goods other than personal luggage. The foundation upon which this argument rests, is, that the word "Glass" was painted on the lid of the box. Putting that word on the package does not to my mind afford any indication that its contents really consist of glass, but merely that the passenger desires to have it handled with more than ordinary care. The very fact of the word "Glass" being painted in a permanent manner on the cover of the box, was in my opinion less likely to lead to the inference suggested than if it was merely put on for the particular occasion. But, assuming that the circumstance I have alluded to did amount to a notice to the porter that the package contained merchandise, and not personal luggage, can you infer from the act of the porter in receiving the article and putting it into the train, that he formed a judgment as to whether it was a thing which the Company were bound to carry as a passenger's personal luggage, so as to amount to a contract on their part to carry it without receiving any additional payment? It is impossible to infer that the porter did or could make any such contract so as to bind the Company. I think that would be pushing to an absurdity the rule that a principal is bound by the acts of his agent within the scope of his ordinary employment. The substance of the case is this,—that the plaintiff, well knowing that the only contract which he had with the Company was a contract for the conveyance of himself and his personal luggage, chose to take his chance of having this package safely carried with him without paying the Company the sum which they would have been entitled to charge him for its conveyance as merchandise. It occurred to my mind, \*in the \*176] course of the argument, that this conclusion might lead to inconvenience. If, for instance, a first-class passenger were to take with him luggage to the extent of a single pound in excess of the 112 lbs. allowed to be carried free of charge, upon a strict construction of the Act of Parliament and notice, it might perhaps be said that this was a breach of the contract, and the Company would not be liable if the luggage so carried in excess were lost. I should be slow to arrive at the conclusion I have expressed, if I thought that would be the result of our judgment on the present occasion. But, in dealing with cases of this kind, we

must look at that which is the usual and ordinary course of proceeding: and we know from our own experience that the ordinary course of proceeding by railway Companies is, to weigh the luggage tendered to them, and to charge for any appreciable excess beyond the amount allowed to each passenger; and, if the Company choose to waive their right to do so, they are bound by the contract. Here, however, we are dealing with a case in which the passenger has by his conduct palmed off upon the Company, to be carried free, a package containing articles which he could only claim to have carried for him upon payment of the Company's ordinary rate for the conveyance of merchandise. Of course I disclaim all intention to impute to him any fraudulent intention: the case expressly negatives that. But I think the Company are fairly entitled to say that the plaintiff never contracted with them to have this package carried by them for hire, which it is necessary that he should have done to entitle him to charge them for the loss. This judgment is not inconsistent with the decision of the Court of Exchequer in *Walker v. Jackson*, 10 M. & W. 161,† viz., that it is the duty of the Company on receiving a parcel to make such inquiry as may be necessary to inform \*them of the nature and value of its contents, and that, if they [\*177 ask no questions, and there be no fraud on the part of the sender, they are liable for its loss. In that case, the Company contracted to convey the carriage with its contents, which turned out to be heavier and more valuable than they had expected. There was no fraud committed or intended; and they chose to abstain from inquiry. Very different would be the case if goods delivered to a carrier to be carried turned out to be of a dangerous nature, and of a kind not usually carried without the adoption of extraordinary precautions. There, the nature of the article being known to the sender, the omission to communicate it to the carrier would amount to something like fraud. The present case, however, does not fall within either of those which have been put; it is not within the last, because it is conceded that there was no fraud,—and it is not within the rule in *Walker v. Jackson*, because the goods lost are not goods which the defendants ever contracted to carry for the plaintiff for hire. For these reasons, I entirely agree with my Lord that the defendants are entitled to the judgment of the Court.

BYLES, J.—I also am clearly of opinion that the defendants are entitled to our judgment on the second plea. The declaration alleges that the defendants are the owners and proprietors of a railway and of certain trains and carriages used by them for the carriage and conveyance of passengers and their luggage, goods, and chattels in and upon and along the said railway for hire and reward; and that the plaintiff at their request became and was a passenger, and was received by them, together with his luggage, goods, and chattels, to be by them safely and securely carried and conveyed with his said luggage, goods, and chattels, from \*Northampton to London; and that, through their negli- [\*178 gence, his luggage was lost. The defendants in answer to that say that they did not receive the plaintiff, together with his luggage, goods, and chattels, on the terms and for the purpose in the declaration mentioned, as alleged. Now, it is plain that the Company, when they received the plaintiff as a passenger with the package described in the special case, did not know that they were carrying merchandise. The

only particle of evidence tending to show that they did, was, the fact that the word "Glass" was painted on the outside of the box. That word, however, would merely indicate that the package contained something which required care; and it might with great propriety be inscribed on many packages which contain personal luggage only. The case, I think, goes further than that; for, not only had the Company no notice that they were carrying merchandise, but there was a distinct representation by the acts and conduct of the plaintiff that it was personal luggage and personal luggage only that they were carrying. I do not think the Company's servants were bound to ask any questions. The package was handed to them as ordinary luggage. That being so, I agree with my Lord in adopting what was said by Lord Wensleydale in *The Great Northern Railway Company, app., Shepherd, resp., 8 Exch. 30,† viz.,* that the defendant's conduct,—without imputing to him any fraudulent intent,—in delivering a package of this description without communicating the fact that it contained merchandise, was in the nature of a concealment, and amounted to a positive representation that it contained ordinary personal luggage only. If that be so, there was no bailment, and no contract. It is just as if a man were to throw a parcel into one of the carriages or to jump in himself after the train had started, \*179] and were to charge the Company with a breach \*of their contract to carry either safely, if his parcel were lost or himself injured. For these reasons, it seems to me that the defendants are entitled to a verdict upon the traverse contained in the second plea.

As to the question whether the provisions of the Company's private Act of Parliament are to be considered as incorporated in all contracts made with the Company, though I do not desire to be understood as expressing any dissent from the opinions entertained by my Lord and my Brother Willes, I would rather not say anything.

Judgment for the defendants.(a)

(a) The case now (M. T. 1861) stands for argument in the Exchequer Chamber.

## THE MIDLAND RAILWAY COMPANY, Appellants; ANNIE PYE, Respondent. May 3.

The 21st section of the Divorce Act, 20 & 21 Vict. c. 85, is not retrospective.

Where, therefore, a married woman whose husband had deserted her obtained a protection order from a magistrate under that section, after the commencement of an action by her in her own name to recover damages against a carrier for the loss of goods intrusted to him by her for carriage,—Held, that the order gave no right to sue.

THIS was an action brought by the plaintiff (the respondent), a married woman, in her own name, against the defendants (the appellants), who are common carriers for hire from Nottingham to London.

The action was commenced by the following plaint:—

"In the Westminster County Court of Middlesex.

"Between Annie Pye, of 8, Stanley Street, Pimlico, widow, plaintiff, and

"The Midland Railway Company, of King's Cross, defendants.

"You are hereby summoned to appear at a County \*Court to be holden at the Court-House, St. Martin's Lane, Westminster, on the 3d day of December, 1860, at the hour of 12 at noon, to answer the plaintiff to a claim the particulars of which are hereunto annexed. [\*180

Debt or claim . . .	£25	0	0
Costs of the plaint	0	17	8
Attorney's costs . .	0	18	0

Total amount £26 15 8

"Dated this 7th day of November, 1860.

"CHRISTOPHER CUFF,

"To the defendants."

"Registrar of the Court."

"In the Westminster County Court of Middlesex.

"*Pye against The Midland Railway Company.*

"This action is brought to recover the sum of 25*l.*, for that, on or about the 13th of August, 1860, the plaintiff delivered to the defendants at Nottingham twenty-one packages of luggage and forty-two packages of furniture, to be carried by them from Nottingham to London for the plaintiff for reward to the defendants in that behalf. By the negligence of the defendants, a box and a set of steps, part of the goods, were lost, and other of the goods were damaged.

"The following is an account of the goods lost and of the goods damaged:—Box lost, containing one chandelier gilt, one bronze chandelier, Brussels carpet, mantle, two morning wrappers, one wrapper, mohair dress, Victoria sable, set of steps.

"Goods damaged,—Four cut spirit glasses, ground-glass butter cooler, large glass shade, two dessert dishes, four dessert plates, two tureens, two vegetable dishes, seven dinner-plates, nine soup-plates, kitchen-table, steel fender and irons, Spanish mahogany sideboard, [\*181  
\*three chairs broken, dining-table broken, sofa-bedstead, nine yards of carpet.

"H. T. ROBERTS, plaintiff's attorney.

"To the defendants."

On the 30th of November, 1860, the plaintiff obtained a protecting order, of which the following is a copy:—

"Metropolitan Police District, }  
to wit, } "I, Thomas James Arnold, Esq.,  
one of the magistrates of the police  
courts of the metropolis, sitting at the Westminster Police Court, in the county of Middlesex, and within the metropolitan police district, do hereby order that all money or property acquired by the lawful industry of Annie Pye (wife of William Pye), at present residing at No. 8, Stanley Street, Pimlico, in the parish of St. George, Hanover Square, in the said county and district, since the 25th day of January, 1859, being the day on which the said Annie Pye was deserted by her said husband, or which she may hereafter acquire, and all property which she has become possessed of or to which she has become entitled as executrix, administratrix, or trustee, since the said 25th day of January, 1859, or which she may hereafter become possessed of, or to which she may become entitled as executrix, administratrix, or trustee, shall be protected; and that such money and property be hereby protected against the said William Pye, his creditors, and any person claiming under him; and that all such her afore-mentioned earnings and pro-

perty shall belong to the said Annie Pye as if she were a feme sole. Given under my hand and seal, at the said Police Court, this 30th day of November, 1860. "T. J. ARNOLD.

"Entered at the Westminster County Court of Middlesex, this 1st day of December, 1860. "JAS. CHEESE, assistant clerk."

\*182] \*Some of the goods which formed the subject-matter of this action were the property of the plaintiff's husband when he deserted the plaintiff: the residue of the said goods were acquired by the plaintiff after that time. It was objected, on behalf of the defendants, that the action had been commenced before the date of the protecting order; but the learned judge ruled that the order, having been obtained before the hearing, enabled the plaintiff to maintain the action in respect of the goods acquired by her since the day on which she was deserted by her husband.

It was proved that the plaintiff's agent at Nottingham, a person named Rose, delivered the goods in question at the Nottingham station of the defendants' railway, directed that they should be insured, which they were, and signed a consignment-note, of which the following is a copy:—

"Consignment Note. Midland Railway,  
"Nottingham Station, Aug. 9th, 1860.

"To the Midland Railway Company.

"Receive for transit as per address and particulars on this note, the under-mentioned goods on the conditions stated on the other side.

"Sender, T. ROSE.

No. of truck.	Name of consignee.	Residence.	Carriage paid by	No.	Description of goods.	Marks.	Weight.				Paid on
							Tons.	cwts.	qrs.	lbs.	
	Mrs. Pye, 22, Devonshire Terrace, Cleveland Square, Hyde Park, London.	1 Chair broken.		21	Packages luggage			13	3	4	
	King's Cross Station, to be called for. THOS. ROSE.				Furniture			16	1	27	

\*183] \*The goods arrived safely and without injury at the King's Cross station, which is the station to which all goods consigned to be left till called for would be transmitted in the ordinary course of the defendants' business.

Upon the 13th of August, notice was given to the plaintiff in the following form:—

"Goods Department.

"King's Cross, N., August 13th, 1860.

"Mrs. Pye, 22, Devonshire Terrace, Hyde Park.

"I beg to inform you that the under-mentioned goods consigned to you arrived this day, and have been sent to the Company's warehouse, where they remain to your order and at your risk; and that this Company will not hold themselves responsible for damage by fire, the act

of God, civil commotion, vermin, or deterioration of quality or quantity by storage or otherwise; and that demurrage will be charged for detention of any wagon the contents of which are not removed within one clear day from the date of advice of its arrival. Your instructions for removal of same will oblige,

“Pro A. H. BOYLAN, E. MARKLEW.”

No. Invoice.	From	No. and description.	Weight.				Rate.	Paid on	To pay
			Tons.	cwt.	qrs.	lbs.			
146	Nottingham	21 packages of luggage		13	3	4			£ s. d. 1 4 6
		42 “ furniture		16	1	27			3 19 9
		Waiting at King's Cross							5 14 3

On the 16th of August, the plaintiff went to the King's Cross station to pay for the carriage and insurance of the goods, and told the official at the goods department there that she wished the goods to remain \*a few days: he said she would have to pay for storage, to which she objected, stating that she had been informed by the clerk in [\*184 the luggage department at Nottingham that no warehouse-room was chargeable when goods were insured, and that they could remain at the station free of charge for one or two months; whereupon the said official said there must be some mistake at Nottingham; he would write to that place, and communicate with the plaintiff immediately on receiving a reply.

On the 4th of September, the plaintiff, not having received any communication, as promised, went again to the King's Cross station, and paid the sum of 5*l.* 14*s.* 3*d.*, and took a receipt for the same on the letter hereinbefore set forth dated 13th of August last, of which receipt the following is a copy:—

“Paid, September 4, 1860.  
“For Midland Railway Company,  
“WM. BRADBERRY.”

On the same day, the 4th of September, some of the goods were sent by plaintiff's direction to her house, Upper Stanley Street: but some were not delivered, and others were damaged, probably from exposure to wet during their stay at King's Cross from the 10th of August till the 4th of September.

No charge was made on behalf of the defendants for warehouse-room or for the carriage of the goods from King's Cross to Stanley Street.

At the close of the plaintiff's case, the defendants' counsel applied for a nonsuit, on the ground that there was no evidence to support the plaintiff's particulars of demand, which charged the defendants only as carriers to London: and it was submitted that the defendants were not liable as carriers for injury or loss to the goods while they remained at King's Cross; but were only liable as warehousemen.

\*The learned Judge refused to nonsuit, saying the particulars might be amended in that respect: and the trial proceeded. No [\*185 application, however, for an amendment was made on behalf of the

plaintiff; the plaintiff contending that the defendants continued liable as carriers up to the time of the delivery of the goods in Stanley Street.

The learned Judge directed the jury that the defendants were liable, if the goods were lost or damaged under any circumstances in their transit from Nottingham to King's Cross; but that, if the loss and damage arose after the arrival at King's Cross, the defendants would not be liable, unless they had failed to take due and reasonable care of the goods after their arrival at King's Cross, in which case they would be liable.

The Judge further told the jury, that, if the goods were lost or damaged while they remained at King's Cross, it would be material for them to consider whether or not they remained at King's Cross through the fault of the plaintiff; for, if the detention of the goods at King's Cross arose from the fault of the plaintiff, she would have no right to complain of any injury to the goods which might have been thereby occasioned.

The jury found a verdict for the plaintiff, for 18*l.* 13*s.*, as being the amount of damage sustained in respect of such of the goods as had been acquired by the plaintiff after her desertion; and that the loss and damage arose after the goods arrived at King's Cross.

The question for the opinion of the Court, was, whether the learned Judge was right in the ruling and direction hereinbefore set forth. If the learned Judge was right in both, then the verdict was to stand. If he was wrong in the ruling, then the verdict was to be set aside, and a verdict for the defendants, or a nonsuit, was to be entered. If he was \*186] right in the ruling, but wrong in the direction, and the Court should be of opinion that the particulars ought not to be amended, then the verdict was to be set aside, and a verdict for the defendants, or a nonsuit, was to be entered.

*W. G. Harrison*, for the appellants.(a)—The direction of the County Court Judge was clearly wrong. In the absence of a protecting order, the goods in question being the husband's goods, the plaintiff would not be in a position to maintain this action. Her right, therefore, in the present case will depend upon the construction which is to be put upon the 21st, 25th, and 26th sections of the Divorce and Matrimonial Causes Act, 20 & 21 Vict. c. 85. The 21st section enacts that "a wife deserted by her husband may at any time after such desertion, if resident within the metropolitan district, apply to a police magistrate, or, if resident in the country, to justices in petty sessions, or, in either case, to the Court, for an order to protect any money or property she may acquire by her own lawful industry, and property which she may become possessed of,

(a) The points marked for argument on the part of the appellants were as follows:—

\*1. That the magistrate's order set forth in the case had no retrospective operation, and that therefore the plaintiff (below) had no right of action in her own right at the time of bringing the action:

"2. That, as the action was brought against the defendants upon a contract to carry from Nottingham to London, and as the jury found that there was no breach of that contract, the defendants (below) were entitled to the verdict:

"3. That the Judge was wrong in directing the jury that they might find a verdict for the plaintiff (below) if they thought that due care of the plaintiff's goods had not been taken at King's Cross, or if they were lost or damaged in their transit from King's Cross to Stanley Street."

after such desertion, against her husband or his creditors, or any person claiming under him; and such \*magistrate, or justices, or Court, [\*187 if satisfied of the fact of such desertion, and that the same was without reasonable cause, and that the wife is maintaining herself by her own industry or property, may make and give to the wife an order protecting her earnings and property acquired since the commencement of such desertion, from her husband and all creditors and persons claiming under him, and such earnings and property shall belong to the wife as if she were a feme sole: Provided always, that every such order, if made by a police magistrate or justices at petty sessions, shall, within ten days after the making thereof, be entered with the registrar of the County Court within whose jurisdiction the wife is resident; and that it shall be lawful for the husband, and any creditor or other person claiming under him, to apply to the Court or to the magistrate or justices by whom such order was made for the discharge thereof: Provided also, that, if the husband or any creditor or other person claiming under the husband shall seize or continue to hold any property of the wife after notice of any such order, he shall be liable, at the suit of the wife (which she is hereby empowered to bring), to restore the specific property, and also for a sum equal to double the value of the property so seized or held after such notice as aforesaid. If any such order of protection be made, the wife shall during the continuance thereof be and be deemed to have been during such desertion of her in the like position in all respects, with regard to property and contracts, and suing and being sued, as she would be under this Act if she obtained a decree of judicial separation." The 25th section enacts, that, "in every case of a judicial separation, the wife shall, from the date of the sentence and whilst the separation shall continue, be considered as a feme sole with respect to property of every description which \*she may acquire, [\*188 or which may come to or devolve upon her; and such property may be disposed of by her in all respects as a feme sole, and on her decease the same shall, in case she shall die intestate, go as the same would have gone if her husband had been then dead: Provided that, if any such wife should again cohabit with her husband, all such property as she may be entitled to when such cohabitation shall take place shall be held to her separate use, subject however to any agreement in writing made between herself and her husband whilst separate." And the 26th section enacts, that, "in every case of a judicial separation, the wife shall, whilst so separated, be considered as a feme sole for the purposes of contract and wrongs and injuries, and suing and being sued in any civil proceeding; and her husband shall not be liable in respect of any engagement or contract she may have entered into, or for any wrongful act or omission by her, or for any costs she may incur as plaintiff or defendant: Provided that, where, upon any such judicial separation, alimony has been decreed or ordered to be paid to the wife, and the same shall not be duly paid by the husband, he shall be liable for necessities supplied for her use: Provided also, that nothing shall prevent the wife from joining, or at any time during such separation, in the exercise of any joint power given to herself and her husband." The plaint in the County Court was sued out on the 7th of November, 1860, in respect of a conversion in September. The protecting order was obtained on the 30th of November, and registered on the 1st of Decem

ber; and the summons was heard on the 3d. The right to sue must exist at the time of the commencement of the action: *Bill v. Bament*, 9 M. & W. 36.† It could not have been the intention of the statute \*189] that the order should have a retrospective effect. Suppose \*the order were obtained after the commencement of the action, and before the day of trial it was rescinded, how would that affect the rights of the parties? Taking the whole section together, it is manifest that the legislature did not intend to give the protection order a retrospective effect so as to bind the rights of third parties. The effect of a sentence of judicial separation under s. 25 has a very different effect. Then, the order does not upon the face of it show a desertion without reasonable cause: the evidence of desertion is most inconclusive and uncertain.(a) [*Udall*, who appeared for the respondent, observed that this was not one of the objections taken in the County Court.] There was no evidence to go to the jury to show that the Company were guilty of any negligence as carriers. As carriers, they received the goods to be safely and securely conveyed to King's Cross: and in this respect the Company's duty was performed. Whilst they remained there at the plaintiff's request, they were held by the Company in the capacity of warehousemen: and, in the absence of evidence of gross negligence, they would not be liable for any injury done to them.

*Udall*, for the respondent.(b)—The ruling of the County Court Judge \*190] was perfectly correct. The effect \*of the protecting order under the 21st section of the Act, is, to make the married woman a statutory feme sole from the date of the desertion. The concluding words of the section are plain and unambiguous,—“If any such order of protection be made, the wife shall during the continuance thereof be and be deemed to have been during such desertion of her in the like position in all respects, with regard to property and contracts, and suing and being sued, as she would be under this Act if she obtained a decree of judicial separation;” that is, she shall for all purposes be deemed to have been a feme sole from the commencement of the desertion. As to the alleged hardship of making the order retrospective, it is not greater than in the case of *Heslop v. Baker*, 6 Exch. 740.† The 9th section of the 21 & 22 Vict. c. 108 (which was passed to amend the former Act) enacts that “every order which shall be obtained by a wife under the said Act of 20 & 21 Vict. c. 85, or under this Act, for the protection of her earnings or property, shall state the time at which the desertion in consequence whereof the order is made commenced; and the order shall, as regards all persons dealing with such wife in reliance thereon, be conclusive as to the time when such desertion commenced.” Why should that be rendered necessary, unless to make it applicable to some condition existing before the date of the order? [BYLES, J.—Would payments made to the husband whilst the state of desertion existed, be invalidated by the subsequent order?] It is submitted that they would. [KEATING, J.—The 8th section of the 21 & 22 Vict. c. 108 validates all

(a) The form of order in use in the Divorce Court merely states the fact of desertion. The petition alleges the desertion to have been without reasonable cause.

(b) The points marked for argument on the part of the respondent were as follows:—

“1. That the ruling of the learned Judge was right, that the action was maintainable:

“2. That there was no misdirection:

“3. That the Judge rightly decided on the matter of practice, and that this was no ground of appeal.”

transactions with the wife between the date of the order and the discharge of it.] Any defect in the form of the order may be cured by an amendment. The duty of the carrier is, to carry and deliver: the Company, therefore, had not performed their contract \*until the goods were delivered at the plaintiff's place of residence. [\*191

*Harrison* was heard shortly in reply.

ERLE, C. J.—I think Mr. *Harrison* is entitled to succeed upon the first point urged by him, viz., that an order for the protection of the earnings and property of the married woman under the 21st section of the 20 & 21 Vict. c. 85, obtained by her during the pendency of the action, will not entitle her to maintain an action which was not maintainable at its commencement. Those whose duty it is to administer the law very properly guard against giving to an Act of Parliament a retrospective operation, unless the intention of the legislature that it should be so construed is expressed in clear, plain, and unambiguous language; because it manifestly shocks one's sense of justice that an act legal at the time of doing it should be made unlawful by some new enactment. Modern legislation has almost entirely removed that blemish from the law: and, wherever it is possible to put upon an Act of Parliament a construction not retrospective, the Courts will always adopt that construction. The first part of the 21st section of the 20 & 21 Vict. c. 85 provides, that, in case of desertion, the wife may apply for an order to protect any money or property she may acquire by her own lawful industry, and property which she may become possessed of after such desertion, against her husband or his creditors or any person claiming under him; and it goes on to provide that the jurisdiction to which the application is made, if satisfied of the fact of such desertion, and that the same was without reasonable cause, and that the wife is maintaining herself by her own industry or property, may make and give to the wife an order protecting her \*earnings and property [\*192 acquired since the commencement of such desertion, from her husband and all creditors and persons claiming under him, and that such earnings and property shall belong to the wife as if she were a feme sole. I can well understand the law giving a retrospect here. The wife is an aggrieved party; the husband delinquent. It is right, therefore, that the order should have a retrospective operation against the husband and against those claiming under him. The whole object of the protection would be frustrated if it were otherwise. Then follow provisions for the registration of the order, and for discharging it, for giving the wife a remedy for a violation of it: and then follows something not exactly corresponding with the rest of the clause,—an enactment in wider terms than what had gone before,—that, “if any such order of protection be made, the wife shall during the continuance thereof be and be deemed to have been during such desertion of her, in the like position in all respects, with regard to property and contracts, and suing and being sued, as she would be under this Act if she obtained a decree of judicial separation.” These words, no doubt, are capable of the construction sought to be put upon them by Mr. *Udall*. But so to construe them would give them a most unjust effect. If this provision were held to be retrospective, the effect would be to invalidate all payments made to the husband in the mean time, and all sales of the husband's property, and would give the wife rights of action against third

persons for acts done by them which were lawful at the time: whereas, the contrary construction does not deprive the wife of any of the protection the statute intended to give her: as to her earnings and property, protection is given to her against her husband and persons claiming under him: and, it may be, also as to existing causes of \*193] \*action, where the action is commenced after the date of the order. But what we are called upon to say, is, that this provision is applicable where the action is commenced before the protecting order is obtained,—which would be taking away from the defendant a defence which he was all along entitled to set up, and fixing him with all the costs of the action. I am clearly of opinion that the provision in question does not operate to give validity to an action brought before the right is acquired. I therefore think the appellants are entitled to judgment.

WILLIAMS, J.—I am entirely of the same opinion. In order to adopt the construction contended for on the part of the respondent, we must hold that the defendant, who justly defended the action at the time it was brought, became a wrongdoer by reason of the order afterwards obtained by the plaintiff herself. I see nothing in the language of the statute which calls for such a construction. The words at the concluding part of s. 21 clearly are not retrospective, whatever may be the case as to the earlier provisions. The Court becomes seised of the suit by a proceeding on the part of a person having a right to sue: and, generally speaking, there can be no right to sue, unless it is vested at the time of the commencement of the proceedings. The case of an executor who has not proved the will is an exception: it is enough if he produces the probate at the trial; but that is because he derives all his rights and authorities from the will. The case of an administrator is different: the administrator, who derives all his power to sue from the letters of administration, must have them at the time he commences the action. Another exception is that of a copyholder who has obtained a surrender, \*194] \*possession is in him by the surrender; but, for the protection of the lord, his title requires to be perfected by admittance. But, in the present case, the law had vested the right to sue, at the time the action was commenced, in the husband and wife; and it would have been impossible for the defendants to have settled the action with the wife. The effect of the protecting order is to give the wife an entirely new right as against third persons. In *Perry v. Skinner*, 2 M. & W. 471,† it was held, that, where a patent is originally void, but amended under the 5 & 6 W. 4, c. 83, s. 1, by filing a disclaimer of part of the invention, that Act has not a retrospective operation, so as to make a party liable for an infringement of the patent prior to the time of entering such disclaimer. Parke, B., there says: “The rule by which we are to be guided in construing Acts of Parliament, is, to look at the precise words, and to construe them in their ordinary sense, unless it would lead to any absurdity or manifest injustice: and, if it should, so to vary and modify them as to avoid that which it certainly could not have been the intention of the legislature should be done. Now, if the construction contended for by Mr. *Rotch* (a) was to be considered as the right con-

(a) That the Act had a retrospective operation, where the infringement took place with respect to a part of the invention to which the disclaimer did not apply.

struction, it would lead to the manifest injustice of a party who might have put himself to great expense in the making of machines or engines, the subject of the grant of a patent, on the faith of that patent being void, being made a wrongdoer by relation. That is an effect the law will not give to any Act of Parliament, unless the words are manifest and plain." The construction we are asked by the respondent to put upon this statute is uncalled for and against all rule.

\*BYLES, J.—I am of the same opinion. The serious consequences which have been suggested, and probably many more [\*195 which have not occurred to the Bar or to the Court, would result from giving the provision in question the construction which has been contended for on the part of the respondent in this case. I am unable entirely to reconcile the 21st and 25th sections of the Act. The 21st section, at the close of it, contains this provision,—“If any such order of protection be made, the wife shall during the continuance thereof be and be deemed to have been during such desertion of her in the like position in all respects, with regard to property and contracts, and suing and being sued, as she would be under this Act if she obtained a decree of judicial separation.” Then, turning to s. 25, we find it provided, that, “in every case of a judicial separation, the wife shall, from the date of the sentence, and whilst the separation shall continue, be considered as a feme sole with respect to property of every description which she may acquire or which may come to or devolve upon her:” and then, in s. 26, it is provided, that, in every case of a judicial separation, the wife shall, whilst so separated,—that is, from the date of the sentence,—“be considered a feme sole for the purposes of contract, and wrongs and injuries, and suing and being sued in any civil proceeding.” Feeling the full force of the difficulties which have been presented to us, it seems to me that we shall be acting consistently with all the rules by which the Courts are guided in the construction of statutes, in holding that the respondent was not in a position to commence this action until the right of action had become vested in her by virtue of the order of the magistrate or the sentence of the Court.

KEATING, J.—We are not called upon to decide on \*the present [\*196 occasion whether the 21st section of the 20 & 21 Vict. c. 85 is in all cases to receive a retrospective construction. Difficulty would no doubt occur in some cases. But, whatever may be the proper construction of the earlier branches of the clause, it seems to me to be perfectly clear that a married woman who has improperly brought an action in her own name, cannot, by obtaining a protecting order just on the eve of the trial, clothe herself with a new character, which will have the effect of throwing a burthen on the defendant.

Judgment of nonsuit, without costs.(a)

(a) See *Ex parte Cartwright, in re Ince*, 31 Law Times 91, where it was held that a married woman deserted by her husband since 1839, who had obtained an order for the protection of her property acquired since that time, might prove against a bankrupt's estate for money lent at different times since 1839, but before the order of protection.

ALFRED HARROP, App., THOMAS FISHER, Resp. *May 3.*

A bill drawn payable to A. B. or order is not transferable without the endorsement of the payee: and an authority from him to one to whom he delivers the bill, to endorse it in his name, is not to be inferred from the mere act of delivery.

THIS was a plaint brought by the respondent against the appellant, and was heard and determined (without a jury) in the County Court of Yorkshire holden at Sheffield, on the 21st of November, 1860.

The particulars of the respondent's demand were as follows:—"This action is brought to recover the sum of 20*l.* 19*s.*, principal and interest \*197] due to the plaintiff \*as the holder of a dishonoured bill of exchange, of which the following is a copy,—

£20 0 0

"Four months after date, pay to my value received.

"To Messrs. A. Harrop & Co., Bellows manufacturers, Sheffield."

"Accepted, payable at the London and Westminster Bank. Alfred Harrop."

"Sheffield, July 8th, 1859.

order the sum of Twenty pounds, for

WILLIAM JOHNSON."

Endorsed,—“Per pro. William Johnson,  
JAMES RADCLIFFE.”

The facts proved were as follows:—A bill of exchange of which the above is a copy was drawn by one William Johnson, and accepted by the appellant, in consideration of goods supplied by Johnson to the appellant to the amount of about 17*l.*, and of Johnson promising to supply further goods to make up the full amount of 20*l.*, but which further goods he never did supply.

Johnson got the bill discounted by one James Radcliffe, who was not aware that the full consideration had not been paid to the acceptor; and Radcliffe bonâ fide paid to Johnson 18*l.* for the bill, and received it from him, but, *from ignorance or inadvertence, did not ask Johnson to endorse it.*

Radcliffe placed the bill in his cash-box, and neglected to present it for payment until two or three months after it became due, when he applied to the appellant personally for payment, and was told by him that the drawer, Johnson, had not supplied all the goods he had promised to supply, but that, if Radcliffe would take off 1*l.* 10*s.* from the amount, he would pay it; and the appellant also informed Radcliffe \*198] that he had supplied the London and Westminster Bank with \*funds to pay the bill at maturity, but, as it had not been presented, he had withdrawn them.

Radcliffe at the time refused to take 18*l.* 10*s.* in full discharge of the amount of the bill, and at a subsequent interview was informed by the appellant that he could not pay the bill until it had Johnson's endorsement on it. Radcliffe told the appellant that he would indemnify him against any claim by any other person on the bill; and the same offer was made by the respondent's attorney at the trial; but in both cases it was refused.

Radcliffe afterwards (not in the appellant's presence) wrote the name

of "William Johnson" as an endorser on the back of the bill, but, immediately after having done so, erased that endorsement, so that it was barely legible at the trial, and endorsed it "Per pro. Wm. Johnson, James Radcliffe." Before doing so, Radcliffe had endeavoured to find Johnson, but had not been able to do so, in consequence of Johnson having left Sheffield, and (as it was supposed) gone to America.

After the endorsement was made in manner above stated, the bill was duly presented for payment, and dishonoured; and the appellant, though applied to frequently, has always since refused to pay it, until Johnson's endorsement in his own handwriting should be obtained.

After all the transactions above stated, Radcliffe paid the bill to the respondent in full discharge of a debt due from Radcliffe to the respondent: and it was taken as admitted by the respondent that he had no other right against the appellant than Radcliffe would have had if he had not transferred the bill to the respondent.

Radcliffe had done other business for Johnson: and Johnson told him at the time when Radcliffe \*discounted the bill for him, that the acceptor was a responsible person, and would be sure to meet the bill at maturity: *but he never gave any express authority to Radcliffe to endorse it in his (Johnson's) name, nor any authority further than what may be inferred from the facts above stated.* [\*199

Johnson had never applied to the appellant on the subject of the bill; but some of the creditors had given notice to the appellant not to pay it to the holder. Johnson cannot now be found. These were the only material facts proved.

Upon these facts, it was contended on behalf of the appellant that there was no evidence of any authority given by Johnson, the payee, to Radcliffe or the respondent, to endorse or write his, Johnson's, name per procuration, and therefore the endorsement was void and of no effect, and the respondent could not recover the amount of the bill and interest in this action.

On behalf of the respondent, it was contended that Johnson's omission to endorse the bill being a mere inadvertence, and that he having received 18*l.* from Radcliffe as discount for the bill, and having delivered the bill to Radcliffe, saying that the acceptors were responsible parties and were sure to meet the bill at maturity, there was evidence that Johnson intended to pass all his right, title, and interest in the bill, and justified Radcliffe in signing Johnson's name "per pro.," and in doing all that was necessary to obtain payment of the bill; and that the appellant was liable to pay it to the holder, more especially as he had offered to pay 18*l.* 10*s.* to Radcliffe on its being first presented to him.

The Judge decided that a jury was at liberty to infer, and ought to infer, from the facts above stated, and he, sitting as both judge and jury, did infer from them, that Johnson had for a good consideration \*transferred his whole interest in the bill to Radcliffe, and had impliedly given Radcliffe authority to obtain payment of it from the acceptor, and to do all acts necessary for obtaining such payment; and that, consequently, the endorsement made by Radcliffe was made by the implied authority of Johnson, and was sufficient to give Radcliffe, or any holder for good consideration from Radcliffe (which the respondent was), a right of action against the acceptor for the amount of the bill: and he gave judgment for the amount sued for. [\*200

If the Court of appeal was of opinion that the decision of the Judge of the County Court was wrong, the judgment given for the respondent was to be set aside, and a nonsuit or judgment for the appellant entered; or, otherwise, the judgment to be confirmed.

*T. Jones*, for the appellant.—The question is whether a bill of exchange which is drawn payable to order, and is passed for value to a third party without endorsement by the payee, may be endorsed by such third party. Without endorsement by the payee, the subsequent holder has no perfect title to sue upon the instrument: and the course has been to file a bill in equity to compel the payee to endorse: see *Ex parte Greening*, 13 Ves. 206. In *Chitty & H. on Bills*, 9th edit. 228, it is said, that, “when a bill or note is payable to the *order* of the drawer, or of a third person as payee therein named, the name of such drawer or payee must appear in the first endorsement, whether such endorsement be intended to convey to the endorsee the absolute property in the bill or note, or merely to enable him to receive payment thereof as agent of such endorser:” *Barlow v. Bishop*, 1 East 432, 3 Esp. N. P. C. 266. “So, where a party *promised* to endorse a bill, and upon \*201] the faith of such \*promise a stranger wrote an endorsement in the name of the party, it was considered that such endorsement was invalid:” *Moxon v. Pulling*, 4 Campb. 51. Again, p. 237, it is said, that, if a party has transferred a bill without endorsing it, when it was intended that he should do so, a bill may be filed in equity to compel him, and his assignees, if he has become bankrupt, to endorse; and a special action on the case might be supported against him for refusing to endorse (*Rose v. Sims*, 1 B. & Ad. 521 (E. C. L. R. vol. 20)); and, if a transfer has been made before, no doubt a formal endorsement may be made at any time after a bill is due, even by the administrator of the party who transferred (*Watkins v. Maule*, 2 Jac. & W. 242); and it should seem, that, as the transfer implies an authority to do all acts necessary to render it available, the party to whom the transfer has been made may sue in the name of the transferrer. But it seems that the promise to endorse will not enable the holder himself to make a sufficient endorsement in his name, especially if at the time of the promise the bill was not in existence, and the only remedy will be to sue him for the breach of his promise, or others in his name:” *Moxon v. Pulling*, 4 Campb. 51. If there were a legal right in the transferee to endorse, there would be no necessity for having recourse to a bill in equity.

*Quain*, contra.—Under the peculiar circumstances of this case, it is submitted there was evidence that Radcliffe had authority from Johnson, the drawer, to endorse this bill. That Johnson intended to pass the property in the bill to the plaintiff, cannot be doubted: and, as it would not legally pass without endorsement, he impliedly gave him authority to put his name upon it, in order to effectuate his intention. In *Byles on Bills*, 7th edit. 26, it is said that “no particular form \*202] \*of authority is necessary to enable an agent to draw, accept, or endorse bills, so as to charge his principal. He may be specially appointed for this purpose, or may derive his power from some general or implied authority.” “An authority is often implied from circumstances:” p. 27. [ERLE, C. J.—Would Johnston be liable as an endorser here?] It may be that he might dispute his liability, and yet

the acceptor be liable to the transferee. In *Prescott v. Flynn*, 9 Bingh. 19 (E. C. L. R. vol. 23), 2 M. & Scott 18 (E. C. L. R. vol. 28), Tindal, C. J., says: "It may be admitted that an authority to draw does not import in itself an authority to endorse bills, but still the evidence of such authority to draw is not to be withheld from the jury, where they are to determine on the whole of the evidence whether an authority to endorse existed or not."

*Jones*, in reply, was stopped by the Court.

ERLE, C. J.—I am of opinion that our decision must be in favour of the appellant. The intention of the parties no doubt was that the property in the bill should pass to the transferee, though by inadvertence the act by which such an intention is indicated, viz., the putting of the endorsement of the payee upon it, was omitted. But the endorsement carries with it so many consequences, that, to hold that a transferee may put upon the bill the name of the transferor, which has been omitted by mistake or inadvertence, would, I think, be introducing a most dangerous degree of laxity into the title of instruments of such extreme value and importance to the commercial world. I think the decision of the County Court Judge was wrong, and that there must be judgment of nonsuit.

WILLES, J.—I am of the same opinion. It might or \*might not be convenient that a person receiving a bill under the circumstances under which this bill was received by the plaintiff, should have a right to endorse upon it the name of the person who paid it to him, in order that the intention of both should be effectually carried out. But hitherto the law has not conferred any such authority: if any such authority exists, it must be by the act of the parties. No doubt the bill was handed by the payee, Johnson, to Radcliffe, in the full expectation that all had been done which was necessary to enable the latter or his endorsee to obtain payment of the amount from the acceptor. But that is at variance with the conclusion which Mr. *Quain* seeks to draw from what passed between them at the time, viz., that an implied authority was given by Johnson to Radcliffe to endorse the bill in his name. [\*203]

BYLES, J.—I am of the same opinion. The law is laid down in very distinct terms in *Story on Bills*, § 201, where it is said: "If the bill is originally payable to a person or his order, there it is properly transferrable by endorsement. We say properly transferrable, because in no other way will the transfer convey the legal title to the holder, so that he can, at law, hold the other parties liable to him ex directo, whatever may be his remedy in equity. If there be an assignment thereof without an endorsement, the holder will thereby acquire the same rights only as he would acquire upon an assignment of a bill not negotiable." Then follows this passage,—which exactly fits the present case,—"If by mistake, or accident, or fraud, a bill has been omitted to be endorsed upon a transfer, when it was intended that it should be, the party may be compelled by a Court of equity to make the endorsement; and, if he afterwards becomes \*bankrupt, that will not vary his right or duty to make it; and, if he should die, his executor or administrator will be compellable in like manner to make it. The assignees of a bankrupt, under the like circumstances, may be compelled to make an endorsement of a bill transferred before his bankruptcy. But, in [\*204]

consent in writing: Should it be necessary for the vessel to take in dunnage or ballast in London, the same to be provided by the owners: A fair gratuity to be paid to the master by the charterers on the satisfactory completion of the voyage: The master to sign bills of lading at any rate of freight, without prejudice to this charter-party: Notice in writing to be given by the master to the charterers or their agents in all cases when the vessel is ready to load or discharge: Penalty on non-performance of this agreement 700*l.* sterling,—it being agreed, that, for the payment of all freight, dead freight, and demurrage, the owner shall have an absolute lien and charge on the said cargo: Five per cent. commission is due on signing this charter-party to Henry Gammon, \*208] \*ship and insurance broker, London, to whom the vessel is to be consigned on her return to the port of London.

“For George Deslandes & Son, of Jersey, owners,

“H. GAMMON, as agent.

“For Samuel Ferguson, Esq., of Anamaboe,

“GREGORY, BROTHERS, as agents.”

At the time when the charter was signed, Messrs. Gregory, Brothers, African merchants, of London, were the agents of the said Samuel Ferguson; and they supplied him with goods to load the Deslandes and two other vessels to the amount of 6000*l.*, for which he was indebted to them: and, while the Deslandes was being loaded in London, Ferguson agreed with Gregory, Brothers, to make them a remittance by the next steamer of 3000*l.* or 4000*l.* in produce or gold-dust, and the balance of his debt by the Deslandes when she returned to London.

The ship sailed to Africa, discharged her cargo, and afterwards returned to London under the said charter, having on board the palm oil mentioned in the bill of lading signed by the master, of which the following is a copy:—

“E 1 @ 14  
2054 galls. of  
palm oil shipped  
by Joseph Peter  
Brown, agent for  
Samuel Ferguson,  
Esq., at  
Badaquy.

4 puncheons  
and 5 barrels  
shipped from  
Anamaboe by  
Mr. Ferguson,  
said to contain  
660 galls. of  
palm oil at Anamaboe.”

“Shipped in good order and well conditioned, by Joseph Peter Brown, agent, in and upon the good ship called the Deslandes, whereof is master for this present voyage John Le Marquand, and now lying in the roadstead of Badaquy, and bound for London, eighteen puncheons and five barrels, containing 2714 gallons of palm oil, for and on account of Samuel Ferguson, Esq., of Anamaboe, being marked and numbered as in the margin; and are to be delivered in the like good order and well conditioned at the \*aforesaid port of London (the act of God, the Queen’s enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, excepted) unto Messrs. Gregory, Brothers, 25, Birchin Lane, City, or to their assigns, *he or they paying freight for the said goods as usual*, with primage and average accustomed. In witness whereof, the master or purser of the said ship hath affirmed to four bills of lading all of this tenor and date, the one of which bills being accomplished, the other to stand void. Dated in Badaquy roads, 4th January, 1859. [\*209

“Weight and contents unknown to

“JOHN LE MARQUAND.

“Not accountable for leakage and breakage.”

The above-mentioned palm oil had been shipped by the said Samuel Ferguson and his agent Joseph Peter Brown at Badaquy and Anamaboe, in Africa; and the bill of lading was sent by the said J. P. Brown, as agent of the said Samuel Ferguson, to Gregory, Brothers, in a letter, of which the following is a copy:—

“Badaquy, 7th January, 1859.

“Messrs. Gregory, Brothers.

“Gentlemen,—I have much pleasure in enclosing herewith B. L. for 2714 gallons of palm oil in all, shipped per schooner Deslandes. At the same time I cannot but express my regret at not being able to purchase more, from the fact of Mr. Ferguson having laid on 100 per cent. on the original invoice cost prices of the goods, with instructions to me to endeavour if \*possible to sell higher, with a view to cover all [\*210 expenses. In consequence of which I was obliged to adhere strictly to his instructions, although attended with great loss. I handed your letter to Mr. James Turner, of Lagos, and was surprised to be informed by that gentleman, that, having no funds in his hands belonging to you, he was unable to purchase corn at his own expense; at the same time making such propositions as I wrote you per steamer Athenian, to which of course I could not agree. I avail myself again by this opportunity of repeating the proposition made in my last relative to a purchase of a cargo of palm oil; and, as I have one or two other offers to the same effect, I have to beg that you will favour me with an early answer thereto, in order that I may be able to decide thereon.

“J. P. BROWN.”

This was the only consignment made by the ship Deslandes to Gregory, Brothers. They had received some previous consignments from Ferguson, not exceeding 1500*l.* in amount; and, after crediting Ferguson with them, and also with the net value of the said palm oil, which was about 300*l.*, Ferguson was still, at the time of the trial, indebted to Gregory, Brothers, on account of the goods supplied to him as aforesaid, to the amount of 4000*l.* or thereabouts; Gregory, Brothers, holding a mortgage of Ferguson's house in Africa, the validity of which as a security is disputed, and the value of which house is about 500*l.*

On receiving the bill of lading, Gregory, Brothers, borrowed 500*l.* from Messrs. Bevan & Co. on security of two bills of lading (the bill of lading above set out being one), which were thereupon endorsed to them by Gregory, Brothers, to secure the said loan of 500*l.* This was on the 15th of February, 1859; and, on the 18th of April following, the ship Deslandes arrived in \*the St. Katherine's Docks on her return [\*211 voyage from Africa; and the oil was landed and warehoused in the said docks.

After the ship's arrival, Bevan & Co., finding that the delivery of the oil was stopped by the defendant for the non-payment of the lump freight of 730*l.* mentioned in the above charter, applied to Gregory, Brothers, to have the said loan of 500*l.* repaid. Gregory, Brothers, thereupon applied to the plaintiff, William Kern, who is an oil-broker, to pay Bevan & Co. the value of the oil on account of Gregory, Brothers, and to take the oil out of the hands of Bevan & Co., at the same time informing him that the oil was stopped for freight.

Gregory & Co. promised the plaintiff that he should have the sale of

the oil on their account if he would accede to their application, which he agreed to do, and applied to Bevan & Co. for that purpose. If the plaintiff had sold the oil for more than the amount advanced, and charges, he would have returned the excess to Gregory, Brothers.

Before Bevan & Co. would part with the oil, they insisted on having a contract of sale from the plaintiff, which he accordingly made and delivered to them. The plaintiff then paid Bevan & Co. 355*l.* 17*s.* 6*d.*, being the value of the oil without any deduction for freight or dock-charges, and received from them the following delivery order:—

“No. 719.

“To St. Katherine’s Docks.

“London, 11 May, 1860.

“Please deliver to Mr. William Kern, or order, ex Deslandes, @ Africa, E twenty-three casks palm oil, as per bill of lading lodged in our name.

“BEVAN, COLE & HARRIS,

“117, Bishopsgate Street Within.”

“Charges to be paid by Mr. Kern.”

\*212] \*The whole of Bevan & Co.’s advances have been repaid by Gregory, Brothers, except the 355*l.* 17*s.* 6*d.* which the plaintiff paid as aforesaid. The bill of lading had been previously endorsed in blank by Bevan & Co., and lodged by them with the St. Katherine’s Dock Company, in whose docks the oil was warehoused at the time the delivery order was given.

The plaintiff had been informed by Gregory, Brothers, that the palm oil was stopped for freight: and, on applying at the docks for the oil, he was informed, as the fact was, that the Dock Company detained the oil by order of the defendant, until the lump freight mentioned in the charter was paid. The plaintiff thereupon applied to Gregory, Brothers, for an indemnity, which was given in the following form:—

“25, Birchin Lane, London, 13 June, 1860.

“William Kern, Esq.

“Sir,—In consideration of your bringing an action against the St. Katherine’s Dock Company or Mr. Deslandes, for the recovery of 8½ tons of palm oil ex Deslandes, we hereby undertake to hold you harmless for any costs, charges, or expenses to be incurred in bringing such action.

“GREGORY, BROTHERS.”

It was admitted at the trial that these proceedings were virtually and in effect those of Gregory, Brothers. The lump freight mentioned in the charter-party is still unpaid to an amount exceeding the value of the palm oil in dispute.

Evidence was given that the usual freight of palm oil for the voyage in question was 70*s.* per ton. The Court were to be at liberty to draw inferences of fact.

The question for the opinion of the Court was,—Whether the first \*213] question raised by the issue should \*be found for the plaintiff or the defendant: and the verdict was to be entered according to the opinion of the Court.

*J. Brown*, for the plaintiff.—The question is whether the assignee of the bill of lading for the oil ex Deslandes was not entitled to have the oil delivered to him on payment of the bill of lading freight. The ship was chartered by Ferguson through the agency of Gregory, Brothers,

for a lump freight of 780*l.* for the voyage out and home. The charter-party contains a clause enabling the master to sign bills of lading at any rate of freight without prejudice to the charter-party,—the meaning of which, according to the recent cases, is, that, although it may prejudice the owner's right of lien upon the goods, it shall not affect his claim under the charter-party. The oil in question was loaded in Africa; the master signing a bill of lading stating it to be deliverable to Gregory, Brothers, or assigns, "he or they paying freight for the said goods as usual,"—which is found by the case to be at the rate of 70*s.* per ton. The bill of lading was remitted to Gregory, Brothers, to whom Ferguson was largely indebted. Gregory, Brothers, obtained an advance of 500*l.* from Bevan & Co., upon the deposit of the bills of lading for these and other goods, and the bill of lading was endorsed to them. Subsequently, Bevan & Co. pressing for the repayment of their advance, the plaintiff, at the request of Gregory, Brothers, paid them the value of the oil, and they gave him a delivery order: but the defendant refused to deliver the oil, claiming to hold a lien upon it for the lump freight under the charter-party. [WILLES, J.—The bill of lading was sent to Gregory, Brothers, for value, but with notice of the charter-party. ERLE, C. J.—This is in effect Gregorys' action.] The plaintiff is \*indemni- [\*214  
fied by Gregory, Brothers. It is now clearly settled that there  
is no distinction between an endorsee for value and the consignee of the bill of lading, and that the fact of notice of the terms of the charter-party makes no difference. In *Gilkison v. Middleton*, 2 C. B. N. S. 134 (E. C. L. R. vol. 89), by a memorandum of charter made at Liverpool, it was agreed that the ship should load a cargo there, and proceed to China, and there deliver the same agreeably to bills of lading, and afterwards load a full cargo of tea or other lawful merchandise for Liverpool or London, and deliver the same to the charterers or their assigns, they paying freight for the same at the rate of 7*l.* 10*s.* per ton of 50 cubic feet for tea delivered, *for the round out and home*; other goods, if shipped, to pay in customary proportion: in consideration whereof, *the outward cargo to be carried freight free*: payment to become due and to be made, as follows,—800*l.* on sailing, by charterers' acceptance at three months' date, and the balance on the unloading and delivery of the cargo, by approved bills on London at two months' date, or cash: "*the master to sign bills of lading at such rate of freight as may be required by the agents of the charterers, without prejudice to this charter-party; and the owners to have an absolute lien upon the cargo for the recovery of all freight, dead freight, demurrage, &c., due the ship under this charter-party.*" By another memorandum, endorsed on the above, Singapore was substituted for China: and it was agreed, that, on delivery of the cargo in Singapore, the freighters' agents there should have the option of loading the ship for London or Liverpool, or for China; that, in the event of the vessel returning from Singapore, the freight *for the round* should be 3875*l.* in full; that, should the vessel proceed to China, the freighters should pay an additional freight of 30*s.* per ton on the homeward cargo from thence, for the \*privilege of carrying in- [\*215  
termediate freight from Singapore to China; and an acceptance  
at three months for 900*l.*, on the ship's sailing from Liverpool, was substituted for 800*l.* The ship was laden by the charterers chiefly as a general ship; but they shipped *on their own account* goods for which

the master signed bills of lading making the goods deliverable at Singapore to M. & Co. or assigns, paying freight as per margin: in the margin the freight (in the aggregate 196*l.* 12*s.*) was declared to be "payable in Liverpool one month after sailing of vessel, lost or not lost." The vessel sailed from Liverpool on the 21st of February, 1856, and the charterers gave their acceptance at three months for 900*l.*, which became due on the 23d of May, and was dishonoured. And it was held, that the owners had a lien upon the goods so shipped by the charterers, for the amount of the bill of lading freight, as against the consignees (M. & Co.), who had advanced money to the consignors upon the shipment; but not for the 900*l.* Cockburn, C. J., there says: "The owners have by their master become parties to bills of lading making the goods deliverable to the consignees on payment of certain specified freight; and the defendants have made advances upon the faith of those bills of lading. The owners, therefore, have, by their own act, placed third parties in a situation in which they would sustain prejudice by their insisting on the full right to which they would otherwise have been entitled." The only difference between that case and the present, is, that there the bill of lading was given for a fresh advance, here for a past debt. [WILLES, J.—The first part of the decision in that case has been doubted, but the second never has.] In *Mitchell v. Scaife*, 4 Campb. 298, which is one of the earliest cases upon the subject, Lord Ellenborough said: "The plaintiff is a bonâ fide endorsee of the bill \*216] of lading. \*He receives the bill of lading, by which the master agrees that the goods shall be delivered to him on payment of a certain specified freight. He knew that this is an instrument which the master has in general authority to sign, and he seems to have had no reason to suspect that this authority was not properly exercised upon that occasion. Under such circumstances, I am of opinion that the owner of the ship cannot be heard to aver against the contract created by his own agent through the medium of the bill of lading." In *Foster v. Colby*, 3 Hurlst. & N. 705,† S. & W. chartered a ship from Liverpool to Calcutta and home for the sum of 7000*l.*, "the freight to be paid 1250*l.* on vessel clearing from Liverpool, and 1000*l.* on delivery of the outward cargo at Calcutta, the remainder in cash two months from the vessel's report inwards, and after right delivery of the cargo, or under discount at 5 per cent. per annum, at freighters' option. *The master to sign bills of lading at any rate of freight required, without prejudice to this charter-party.* The owners of the ship to have *an absolute lien on the cargo for all freight, dead freight, and demurrage.*" There were provisions for payment of the freight in cash on delivery of the cargo, if the cargo was delivered abroad. S. & C., who were the charterers' agents at Calcutta, having made advances to disburse the vessel, shipped a quantity of linseed, for which the captain signed bills of lading deliverable to their order or assigns on payment of freight at 5*s.* per ton, the current rate being 5*l.* 10*s.* Against this shipment S. & C. drew a bill of exchange, and endorsed and delivered it, together with the bill of lading, for value. And it was held, that, assuming the charter-party to have created a lien for the charter freight as against the charterers, a bonâ fide endorsee of the bill of lading, without notice of the \*217] charter-party, was \*entitled to the linseed, on payment of the bill of lading freight. Pollock, C. B., there says: "If a ship-

owner so conducts his business as to permit the master to sign bills of lading at a lower freight than that payable by the charter-party, in consequence of which parties are induced to make advances on such bills of lading, the shipowner is bound." And Watson, B., says that the object of the stipulation that the owner should have "an absolute lien on the cargo for all freight, dead freight, and demurrage," is, "not to enlarge the right of lien for freight, but to give a lien for dead freight and demurrage." So, in *Shand v. Sanderson*, 4 Hurlst. & N. 381,† by a charter-party made between the defendant and H., a ship was chartered to proceed to Madras and load a cargo there from the agents of H., and, being so loaded, to proceed to London and deliver the same on being paid freight at 3*l.* 15*s.* a ton, &c.,—"the captain to sign bills of lading for his cargo for any rate of freight required, without prejudice to this charter-party." C. S., who acted as agent of H. at Madras in respect of the charter-party, by his directions purchased sugars and loaded them on board. The captain, at the request of C. S., signed a bill of lading, deliverable to the order of C. S., at 1*l.* per ton freight. H. stopped payment, and never paid for the sugar. The sugar having arrived in London,—it was held, upon the authority of *Foster v. Colby*, that C. S. (who had retained his dominion over the bill of lading) or the parties in London who represented him, were entitled to the sugar, on payment of the bill of lading freight. [BYLES, J.—The Lord Chief Baron in that case gives an interpretation of the expression "without prejudice to this charter-party," which, he says, means "not that a right of lien must be presumed, but that the charter-party is not to be considered as waived, and that all rights created by it \*are [\*218 to exist as a matter of contract, though they do not attach on the goods by way of lien." The power given to the master to sign bills of lading at any rate of freight without prejudice to the charter-party, is given for the very purpose of enabling the endorsee to obtain the goods on payment of the bill of lading freight: and, if the object be to make the bill of lading negotiable, it can make no difference whether it is endorsed for a present advance or for a past debt. In *Byles on Bills*, 7th edit. 108, it is said: "A pre-existing debt due to the holder of a negotiable instrument is a good consideration, and it should seem is equivalent to a fresh advance. At all events, where the bill or note is payable at a future time, it places the holder in the same situation as if he had made fresh advances on the instrument; for, the remedy for the previous debt is suspended till the maturity of the bill or note." And in note (a), the learned author adds: "In America, the judicial decisions on this important point vary in different states. But the Supreme Court of the United States has gone the full length of holding that the taker of a note for a pre-existing debt has all the rights of a holder for a new consideration: *Swift v. Tyson*, 16 Peters 1." [ERLE, C. J.—The stress of the case here is, that Ferguson, the charterer, is the shipper of the oil, and that Gregory, Brothers (who are the real plaintiffs), must stand on Ferguson's title.] That assumes that the fact of their having notice of the terms of the charter-party varies their rights. *Gilkison v. Middleton* is confirmed by *Neish v. Graham*, 8 Ellis & B. 505 (E. C. L. R. vol. 92). Reliance will be placed on the other side upon *Faith v. The East India Company*, 4 B. & Ald. 630 (E. C. L. R. vol. 6), *Small v. Moates*, 2 M. & Scott 674 (E. C. L. R. vol. 28), 9 Bingh.

574 (E. C. L. R. vol. 23), and *Gledstanes v. Allen*, 12 C. B. 202 (E. C. L. R. vol. 74): but these cases are all clearly distinguishable from the present.

\*219] *\*Shae*, Serjt. (with whom was *Francis*), for the defendant.— This case is plainly distinguishable from all those in which it has been held, that, notwithstanding the stipulation which is contained in this charter-party, the consignee of the bill of lading was entitled to have the goods delivered to him on payment of the bill of lading freight. Here, the charter-party was procured by Gregory, Brothers, as the agents of Ferguson. They had supplied Ferguson with goods for the outward cargo to the extent of 6000*l.*, and Ferguson was to make them consignments or remittances in discharge of that debt. The ship accordingly proceeded to Africa, and Ferguson shipped return cargo, getting the master, in fraud of the charter-party, which made all his goods subject to a lien for the lump-freight, to sign bills of lading making the goods deliverable to Gregory, Brothers, on payment of a nominal freight. According to all the authorities, the stipulation that the master shall sign bills of lading at any rate of freight without prejudice to the charter-party, is to be read with this restriction, that he may not sign bills of lading for goods shipped by the charterer himself and consigned to himself or to a person identified in interest with himself. This is not at all inconsistent with *Mitchell v. Scaife*, 4 Campb. 298, *Foster v. Colby*, 3 Hurlst. & N. 705,† and *Shand v. Sanderson*, 4 Hurlst. & N. 381.† In *Foster v. Colby*, *Stewart & Calrow*, though called the agents of Syers, Walker & Co., were in truth not so: and the goods never were at the disposal of Syers, Walker & Co.: and, in giving judgment, the Lord Chief Baron says: “It is impossible to distinguish the case from *Gilkison v. Middleton*. That case is a conclusive authority in favour of the plaintiff. It was said that *Stewart & Calrow* shipped the goods intending them for the charterer; but, though that might at one time

\*220] have \*been their intention, it is clear, that, when the goods were put on board, they intended to keep them under their own control.” The ground of the decision in *Gilkison v. Middleton* is well put by Cockburn, C. J.,—“The cargo,” he says, “being expressly made liable for all freight due under the charter-party, it follows, that, on the arrival of the ship at Singapore, there was 900*l.* due for freight, for which the cargo was liable. If matters had so remained, the owners clearly would have had a lien for that 900*l.* But they have by their master become parties to bills of lading making the goods deliverable to the consignees on payment of certain specified freight; and the defendants have made advances upon the faith of those bills of lading. The owners, therefore, have, by their own act, placed third parties in a situation in which they would sustain prejudice by their insisting on the full right to which they would otherwise have been entitled.” The parties who there claimed the goods on payment of the bill of lading freight, were persons who had advanced money on the faith of the bill of lading, believing that the master had authority from his owners to enter into the contract contained in that document. That is not the case here; for, Gregory, Brothers, having themselves negotiated the charter-party for Ferguson, knew all the stipulations contained in it. *Small v. Moates*, 2 M. & Scott 674 (E. C. L. R. vol. 28), 9 Bingh. 574 (E. C. L. R. vol. 23), is precisely in point. There, by a charter-party it was agreed

between the owner and one Wilkinson, freighter of the ship York, that he (Wilkinson) should be appointed to the command of the ship for a certain voyage; that the ship should be found at the expense of the owner with all stores, &c.; that Wilkinson should be at liberty to load on board her in the port of London all such lawful goods as he might think fit, and should set sail and proceed with the same to such \*port or ports in the East Indies as he might think fit, and there [\*221 unload, and reload all such lawful goods as he might think proper, and finally return to the port of London; and that the ship during the voyage should be kept tight, &c., at the expense of the owner. The freighter agreed to *accept, receive, and take the ship into his service*, and to take upon himself the command, &c.; that he, his executors or administrators, should pay or cause to be paid to the owner, his executors, &c., freight *for the use or hire* of the ship after a certain rate per ton, such freight to be paid, part in cash on the ship clearing outwards, further part by bills at two months on the day she should be reported inwards, and the remainder by bills at two months on her final discharge; and that the freighter should pay all port charges, &c., and provide a sufficient crew, pay the wages of such crew, and furnish them with provisions, &c., for the voyage: from all which charges he engaged to indemnify the owner. And it was expressly agreed *that the right of ownership of the said ship should, during the continuance of the charter-party, remain firmly and be fully vested in the owner*, his executors, &c., and he and they should at all times during the said intended voyage and service, have *a full and complete lien upon the loading of the ship, as well for all losses and damages which the owner, his executors, &c., might sustain in consequence of the non-payment of any of the bills to be given for freight, as for all arrears of freight to become due under and by virtue of those presents, and for seamen's wages, &c.; and that the owner, his executors, &c., should have full power and authority to hold and retain the said goods until full payment and satisfaction of all such losses, charges, damages, and arrears of freight, &c.* The freighter not being able to procure a sufficient homeward cargo, shipped as dead freight a quantity of rice and \*saltpetre, upon the security of [\*222 which he borrowed 800*l.* from B. B. & Co. of Calcutta, to whom he made and endorsed bills of lading for the same, freight being therein expressed to be payable for the goods at 1*s.* 6*d.* per ton. Wilkinson, the freighter, handed to B. B. & Co. a bill upon the plaintiffs for 800*l.*, and B. B. & Co. endorsed and transmitted the bills of lading to them as a security for the repayment of that sum. The plaintiffs duly paid the bill. Wilkinson afterwards became bankrupt, being indebted to the defendant (the owner) in the sum of 1750*l.* for freight and charges. It was held that the plaintiff was not entitled to the possession of the rice and saltpetre, on payment of the freight reserved by the bills of lading, or of reasonable freight for the carriage and conveyance of the same from Calcutta to London; but that the defendant (the owner of the ship) was entitled to retain the same for the whole of the freight and other payments due to him, under the express reservation contained in the charter-party,—without reference to whether or not, upon the proper construction of the charter-party, the possession of the vessel was taken out of the owner and vested for the time in the charterer. In giving judgment in that case, Tindal, C. J., says: "Where goods are put on

board a general ship under a bill of lading, and the owner of the ship has by the charter-party reserved to himself a lien upon the goods laden on board the ship for his freight due under the charter-party, he has such lien to the extent of the freight due for those particular goods under the bill of lading, whether the goods remain the property of the same person during the voyage, or are sold before delivery to a stranger; or, in other words, the shipowner's lien remains unaltered, whether the bill of lading is endorsed to a third person for a valuable \*223] consideration or the goods are deliverable to the \*original consignee. And, upon the same principle, it would seem to follow, that, if the lading in the ship belongs to the charterer, and such lading is subject to the shipowner's lien for the freight reserved by the charter-party, such lading, if it be sold by the charterer after it is put on board, would pass to the purchaser subject to the lien which the shipowner had before the sale." *Faith v. The East India Company*, 4 B. & Ald. 630, in substance decided the same thing. In *Gledstanes v. Allen*, 12 C. B. 202 (E. C. L. R. vol. 74), by a charter-party, it was stipulated that the ship should proceed to Penang, and there load a full and complete cargo of legal merchandise from the charterers' factors, and proceed therewith to London, and there deliver the same on being paid freight "a lump-sum of 2800*l.* in full of all charges." At the end of the charter-party was the following clause,—"*The captain to sign bills of lading at any rate of freight, without prejudice to this charter. In the event of a less freight, the bills of lading of part of the cargo to be filled up for loss, if any.*" Under this charter-party, the charterers shipped at Penang goods of their own, for which the captain signed bills of lading at a certain specified rate of freight. The goods so shipped were consigned for sale to the plaintiffs, the correspondents of the charterers in London, who were under a general engagement to honour bills drawn upon them by the charterers, upon the faith of consignments to be made to meet them, and who were deeply in advance at the time of the shipment in question. And it was held that the owners had a lien upon the goods for the entire lump freight. That case does not differ in any important particular from this. The judgment of Cresswell, J., is very much to the purpose here. "I find it extremely difficult," he says, "to put any sensible construction upon the last clause in the charter-party. I \*224] \*am unable to discover what was the intention of the parties. It is clear, however, that they intended one thing,—that the charterers should sustain no prejudice from the master's signing bills of lading at rates of freight to be agreed on between him and the charterers. I should rather suppose it was contemplated that, the captain should sign bills of lading for goods put on board by general shippers, and not for the charterers' own goods. In any event, I think the charterers putting their own goods on board, and getting the master to sign bills of lading for them, could not affect the rights of the owners under their contract for the lump freight." [BYLES, J.—The whole Court disclaim founding their decision on the words "In the event of a less freight, the bills of lading of part of the cargo to be filled up for loss, if any." Those words being out, the case seems to be exactly like this.] There is a broad distinction running through all the cases, between a shipment by the charterer and a shipment by a third person.

*Brown*, in reply.—The argument on the other side would have the effect of destroying the negotiability of these bills of lading. It is

quite impossible to reconcile the language of this charter-party with the entire preservation of the owner's lien. *Small v. Moates* and *Gledstanes v. Allen* are not reconcilable with *Gilkison v. Middleton*, the only possible distinction between which and the present case, is, that there the bill of lading was endorsed for a present, and here it was for a past debt. *Cur. adv. vult.*

BYLES, J., now delivered the judgment of the Court:—

This was an issue directed to try whether the \*plaintiff, William Kern, was entitled to have 2714 gallons of palm oil landed [\*225 ex the ship *Deslandes*, and warehoused in the St. Katherine's Docks, delivered to him without payment of the charter freight thereon.

The issue came on to be tried before the Lord Chief Justice of the Queen's Bench, at Guildhall, when a verdict passed for the plaintiff, subject to the opinion of this Court on a special case,—the Court to be at liberty to draw inferences of fact.

We are of opinion that the defendant is entitled to enter the verdict.

The question is, whether the plaintiff is entitled to the cargo on payment of the bill of lading freight only, or whether the defendant has a lien as against the plaintiff for 785*l.*, the amount of the charter freight.

Ferguson was the charterer. Ferguson was also the shipper and owner of the oil in question. All the cases show, that, as against the charterer, there is a lien on his goods for the amount of the charter freight. From the moment, therefore, the goods were put on board, they were, as against Ferguson and those who must stand on his title, bound by that lien, under the express terms of the charter-party which he executed: see *Small v. Moates*, 2 M. & Scott 674 (E. C. L. R. vol. 28), 9 Bingham 574 (E. C. L. R. vol. 23).

Now, Gregory, Brothers, who, as appears by the case, and was admitted at the trial, are the real plaintiffs, stand entirely upon Ferguson's title. Gregorys are stated to have been Ferguson's agents. Ferguson took in favour of Gregorys a bill of lading of the oil at a freight below the charter freight, and handed it over to Gregorys, that Gregorys might (as we collect from the case) apply the proceeds of the oil to the reduction of Ferguson's debt to them. But Gregorys were not [\*226 \*only the agents of Ferguson, but took the bill of lading with full notice of the terms of the charter-party; for, they had themselves, on the part of Ferguson, negotiated the charter-party and signed it.

Two cases in this Court,—the case of *Small v. Moates*, 2 M. & Scott 674 (E. C. L. R. vol. 28), 5 Bingham 574 (E. C. L. R. vol. 23), and the more recent case of *Gledstanes v. Allen*, 12 C. B. 202 (E. C. L. R. vol. 74), seem to be in point for the defendant, and to show that Gregorys stand on Ferguson's title, both because they are Ferguson's agents and because they had notice of the terms of the charter-party.

The case under consideration is obviously distinguishable from those cases where the bill of lading was originally given to one who was a stranger to the charter-party, or afterwards passed into the hands of a stranger without notice of the terms of the charter-party.

For these reasons, we think the verdict for the plaintiff should be set aside, and a verdict entered for the defendant.

Judgment for the defendant.(a)

(a) Error was brought upon this judgment; but the matter was compromised before argument.

**\*227] \*WHITE v. BAYLEY and Others. April 19.**

An agent or servant who is allowed to occupy premises belonging to his principal for the more convenient performance of his duties, acquires no *estate* therein, although he be also allowed to use the premises for carrying on therein an independent business of his own.

THE first count of the declaration charged that the defendants broke and entered a certain house and premises of the plaintiff in Bloomsbury Street, Russell Square, and retained possession thereof from the 8th to the 26th of November, 1860, and also of certain books and papers of the plaintiff, whereby his trade was interrupted, &c. There was a second count, for the conversion of the plaintiff's books, &c.

The defendants pleaded,—first, not guilty,—secondly, as to the breaking and entering and taking and retaining possession of the premises, and as to the alleged trespasses to and conversion of the books, &c., not possessed,—thirdly, to the alleged trespasses in the last plea mentioned, leave and license.

The cause was tried before Erle, C. J., at the sittings at Westminster, after last Term, when the following facts appeared in evidence:—

The plaintiff was formerly a bookseller in Glasgow. The defendants were the managers of a certain association, called The Swedenborg Society, which was established in the year 1810 for the purpose of disseminating the writings of Swedenborg. The society, having by means of legacies and otherwise become possessed of a large stock of books and of a sum of money, resolved in the year 1854 to establish a library and reading-room for the use of its members, and a shop for the sale of their works, and advertised for a librarian and storekeeper: and, on the 6th of July in that year, the committee of management at a meeting held on that day came to the following resolution:—

“That the person to be appointed should have premises rent and tax  
\*228] free in a good situation; that 35*l.* \*per cent. should be allowed to the storekeeper on all books sold out of the shop, but not on donations or subscriptions,—he making such arrangements with booksellers, agents of the society, as the committees should from time to time determine. To carry on a retail business in other New Church works and general literature for his own benefit. The committee to guaranty 150*l.* the first year.”

The plaintiff offered himself as a candidate for the situation; and at a meeting of the committee held on the 13th of July, 1854, the following resolution was come to:—

“That Mr. White of Glasgow be elected the storekeeper and agent, on the general terms mentioned in the resolution passed at the preceding meeting of the 6th, with such modifications as may be mutually agreed upon; and that he be requested to meet the committee as early as possible, to arrange the final terms, and to assist in looking for a proper house.”

This resolution was communicated to the plaintiff, and he came to London and entered upon the duties of his office of manager or storekeeper, librarian, and agent to the society.

In 1855, the society purchased the lease of the premises No. 36 Bloomsbury Street, which was assigned to John Spurgin, Samuel Dean, Thomas Watson, and H. R. Williams, as trustees for them. On taking

possession, the defendants used the ground-floor as a shop or warehouse for the sale of their books; the first floor being used as a library and reading-room, and the upper floors as a residence for the plaintiff and his family. Over the shop was painted in large letters the words "Swedenborg Society," and on the door-posts "William White, Bookseller and Publisher:" and the plaintiff, in addition to his duties as agent to the society, carried on an extensive bookselling business there.

\*From year to year the plaintiff's reappointment was made in terms substantially the same as above mentioned. In 1857, the minute of an appointment in the Company's book was as follows:—  
 "That Mr. White be manager for the ensuing year, at a salary of 75*l.* a year, and six months' notice of separation on either side." In 1858 and 1859, he was reappointed under similar resolutions.

Some disputes having arisen amongst the members of the society, in which the plaintiff necessarily became involved, a resolution of the committee was passed on the 2d of August, 1860, that six months' notice should be given to the plaintiff to terminate his engagement and to quit the premises; and such notice was accordingly given: but on the 4th of October the resolution was rescinded, and the notice withdrawn: and ultimately, at a meeting of the committee on the 8th of November, 1860 (the plaintiff being present), it was resolved,—“That Mr. White be now dismissed, and that he be required forthwith to quit the society's house in Bloomsbury Street, and to remove his own stock and other property.”

Formal notice was thereupon given to the plaintiff in writing of such his dismissal, and he was required to quit the premises; and, on his refusal to do so, possession was taken of them by the defendants on behalf of the society, and retained (the plaintiff's books and furniture remaining thereon) until the 26th of November, when the plaintiff forcibly re-entered. The society then took proceedings against the plaintiff in Chancery, and obtained an injunction, under which he was compelled to give up the premises.(a) He thereupon, without demanding his property (which still remained in the house), brought this action.

\*On the part of the defendants, it was insisted that the first count could not be sustained, inasmuch as there was no such possession or occupation of the premises by the plaintiff as to entitle him to maintain trespass, he having had merely a permissive occupation as the servant of the defendants: and for this *Mayhew v. Suttle*, 4 Ellis & B. 347, 357, was relied upon as an authority. There, by agreement between S. and M. it was recited that S. was in possession of a messuage whereon the sale of beer had been for some time past and was then carried on and conducted by U. for and on S.'s account; that M. was desirous of carrying on and conducting such trade for S., and which he had agreed to for the consideration after mentioned; and it was witnessed that S. agreed, in consideration of a bondsman to be answerable for 50*l.* in default of payment by M., that M. should from the date of the agreement enter upon the premises and carry on and conduct thereon such trade for S. in the place and manner, and with and upon the same privileges and terms as U. had done, until the agreement should be determined by the notice after mentioned: and M. agreed, during all the

(a) See a report of these proceedings before V. C. Stewart, *Spurgin v. White*, 7 Jurist N. S. 15.

time he should carry on and conduct the trade on the premises for S., that all the beer which should be sold by M. on the premises should be taken by him from S., and that M. should not part with the trade or occupation without the license of S.; that, when either party should be desirous of determining the agreement, M., on receiving from S. a month's notice, without being paid any money or consideration by S., should quit and deliver up to S. the trade and possession of the premises, with all such fixtures and things belonging to S. as should then be thereon; and M. should be at liberty to leave the trade and quit the occupation on giving a month's notice to S. M. having entered into \*231] possession of the \*premises under this agreement, it was held by the Exchequer Chamber,—affirming the judgment of the Court of Queen's Bench,—that he occupied, not as *tenant*, but as *servant* to S., and could not maintain trespass against S. for entering without a month's notice. As to the second count, it was submitted that there was no conversion.

His Lordship, yielding to the objections, nonsuited the plaintiff.

*Parry*, Serjt., now moved for a new trial, on the ground of misdirection.—It may be conceded, that, if the plaintiff had been put into the house for the mere purpose of managing the defendants' business, and selling their works, he would not have had such an interest in the premises as would entitle him to maintain trespass against the defendants: but the question is, whether the circumstances under which he was engaged, and the fact of his being permitted to carry on his own private business thereon, did not create a tenancy from year to year, or at all events a tenancy for six months,—determinable only upon a six months' notice, and so take the case out of the authority of *Mayhew v. Suttle*, which was relied on at the trial. [WILLES, J.—The case of *Hartley v. Moxham*, 3 Q. B. 701 (E. C. L. R. vol. 43), 3 Gale & D. 1, seems to be in point as to the second count. There, the defendant claiming a sum of money as due to him from the plaintiff, his lodger, locked up the plaintiff's goods in a room which he held of the defendant, and in which the plaintiff had put them, kept the key, and refused the plaintiff access to them, saying that nothing should be removed until the defendant's bill was paid: and this was held not to be such a taking of the goods as would sustain an action of trespass. There was another case, in this Court, of *West v. Nibbs*, 4 C. B. 172 (E. C. L. R. vol. 56), where \*232] it was held that a \*landlord who has accepted the rent in arrear, and the expenses of the distress after the impounding, cannot be treated as a trespasser merely because he *retains possession* of the goods distrained,—although his refusal to deliver them up to the tenant may amount to a conversion, so as to render him liable in trover. This is not a mere technical distinction: it gives the party notice, by the demand of the goods, of the cause of complaint against him.] The seizure of the goods here was rather a consequence of the taking possession of the premises, than an independent wrongful act. [BYLES, J.—What interest in the land had the plaintiff here?] At the very least he was entitled to hold the premises for six months. [BYLES, J.—As tenant at will? or what?] Taking the resolutions and the rest of the evidence together, the arrangement, it is submitted, amounted to this,—that, in consideration of his taking upon himself the duties of manager or agent to this society, he was to receive a certain amount of salary,

and also the use and occupation of the premises for the purpose of carrying on his own business thereon, subject to a six months' notice of separation, that is, to determine his occupation as well as his services. It may be conceded, that, if the plaintiff was put into possession of the premises *merely* for the purpose of managing the society's business and selling their works, he might,—subject to any claim for wrongful dismissal,—have been turned out at any moment. The case ought not to have been withdrawn from the jury.

WILLES, J.—I am of opinion that there ought to be no rule in this case. The question is, whether by the arrangement which took place between the parties the plaintiff acquired any estate in the premises in Bloomsbury Street, or whether his occupation of \*them was merely [\*233 an occupation as the servant of the society which the defendants represent. It might be that that question should be answered against the defendants, and yet they might be at liberty to raise another question, viz., whether, assuming that the plaintiff had any interest in the house, it was anything more than a tenancy at will, and whether that tenancy was not sufficiently put an end to by what was done by certain of the lessors. I do not, however, intend to discuss that question, because, upon the correct construction of the documents, it appears to me,—and on the facts there is no dispute,—that no interest in the premises even to the extent of a tenancy at will ever did vest in the plaintiff. My reason for thinking so, is, that, looking at the whole of the arrangement between the parties, it resulted in an agreement that the plaintiff was to give his services to the Swedenborg Society as manager for the purpose of selling the Swedenborg publications. The main and principle of the arrangement was that; and the part upon which my Brother *Parry* relies for the purpose of showing that an interest in the premises was vested in the plaintiff, was merely accessory to that arrangement, and part of the machinery for carrying it into effect,—a mere mode, in short, of paying the plaintiff in part for his services as manager. Taking the agreement to have been that the plaintiff should be employed as manager, to be paid a certain salary in moneys numbered, there could have been no doubt whatever that his occupation would have been an occupation, *merely* as a servant of the society. Can it make any difference, that, as part of the remuneration for his services, he was to have liberty to carry on the retail bookselling business on the premises on his own account? Clearly not. Whether the whole amount of his salary was paid to him in money, or part in money \*and part in the per- [\*234 mission to occupy himself and the premises in the carrying on that limited trade, can, as it seems to me, make no difference in the construction of the contract between the parties. I can quite conceive a case such as this, where the representatives of such a society might go to a person having already a shop where he was carrying on business, and agree with him to become their agent for the sale of their particular publications, and to pay him a certain salary for his services, and in addition to pay the rent and taxes of the premises, and where a question might arise whether by this arrangement an interest in the shop vested in the society. The proper answer in such a case would seem to me to be that it would not. But the reasoning applicable to that case would not be applicable here; because here the society became the tenants of the shop and premises, and there is nothing to show that

General Insurance Company,—after reciting that the plaintiff had theretofore carried on the business of a stationer and printer in partnership with one William Edmund East, at No. 1, St. Dunstan's Hill, in the city of London, under the firm of Charles Skipper & East, and that \*238] the \*plaintiff was then solely carrying on the said business under the like firm, and that by a policy No. 60,046, an insurance against fire to the amount of 6000*l.* with or in the said Liverpool and London Fire and Life Assurance Company, and by a policy numbered 183,027 an insurance against fire to the amount of 2500*l.* with or in the said Manchester Fire Assurance Company, and by a policy numbered 967 an insurance against fire to the amount of 2500*l.* with or in the said General Insurance Company, had been respectively effected, subject to the conditions therein respectively set forth or referred to, upon divers chattels and things in and about the said shop, workshops, printing-offices, and warehouses of the said partnership firm, situate at No. 1, St. Dunstan's Hill aforesaid, as on reference to the same policies, would more fully appear; and that, on or about the 7th of March, 1860, an accidental fire had occurred at the said premises, whereupon, or afterwards, the plaintiff had claimed to have made good by the several companies parties to the said agreement, or some of them, the loss thereby sustained to the said insured chattels and things so far as such loss was covered by the said policies, or any of them; and that four several writings to the said agreement annexed, and respectively marked with the letters A, B, C, and C a, and signed by the plaintiff (which writings were respectively thereafter referred to as schedules A, B, C, and C a), contained the particulars of all the chattels and things alleged by the plaintiff to have been covered by the said policies, or some or one of them, and to have been destroyed or injured by or in consequence of the said accidental fire; and that it had been agreed between the said parties thereto that the said claim of the plaintiff, so far as respected the chattels and things particularized as aforesaid in schedule A, should be satisfied by means of the payment to him of a sum of \*239] \*2771*l.* 19*s.* 5*d.*, such sum being the agreed value at the time of the occurrence of the said accidental fire of the last-mentioned chattels and things, as the plaintiff did thereby admit; and that the said sum of 2771*l.* 19*s.* 5*d.* had been so agreed to be paid as last aforesaid, subject and without prejudice to the apportionment as between or among the several companies parties to the said agreement of the same sum, as a loss to be borne by all or some or one only of them according to the respective liabilities under the said policies, as all the said companies parties thereto did thereby respectively admit; and that the items and total amount of the sums alleged by the plaintiff to have been the value at the time of the occurrence of the said accidental fire of the chattels and things particularized as aforesaid in the schedules B, C, and C a, were set forth in the said schedules; and that, difficulties having arisen respecting the settlement of the said claim of the plaintiff so far as the same had not been agreed to be satisfied as aforesaid, and respecting the adjustment of the respective liabilities of the said companies parties thereto, as between or among themselves, to the total loss covered by the said policies, it had been agreed by all the parties thereto that it should be referred to the arbitrators thereafter named, or their umpire, to decide and determine, in manner and subject to the stipulations there-

inafter expressed, the several questions and matters thereafter specified or set forth,—it was by the said agreement provided (amongst other things) that the said Liverpool and London Fire and Life Insurance Company and the said other two companies did thereby agree with the plaintiff, who did thereby agree with the said companies and with each of them, and each one of the said companies did thereby agree with the others and each other of them, as follows, that is to say, that it should be and was thereby accordingly referred \*to the award, arbitrament, and determination of H. W. Caslon, of, &c., type-founder, [\*240 and A. J. Lewis, of, &c., printer's appraiser and printer, or their umpire (such umpire being a person nominated in writing by the said arbitrators before they should proceed to the business of the said reference, to award and determine what was the total sum of money which ought to be paid to the plaintiff under or by virtue of the said policies, or any of them, in respect of loss or damage occasioned by the said accidental fire to or in the said chattels and things particularized as aforesaid in schedules B, C, and C a, and what were the several proportions in which such total sum, and also the said sum of 2771*l.* 19*s.* 5*d.* agreed to be paid as aforesaid, ought to be borne and paid among or between the several companies parties thereto; it being understood and agreed by all the parties thereto that the said arbitrators or their umpire should, as incidental to the decision of the questions aforesaid, or either of them, have full power to determine whether any of the last-mentioned chattels and things were or were not covered at all by any of the said policies, and by which of such policies in particular, to the exclusion of the others or any other of them, any of the same chattels and things were covered, and whether or not the same chattels and things, or any of them, were in part destroyed or damaged by or in consequence of the said accidental fire, and generally all other questions and matters necessary to be determined for the purpose of the award to be made in pursuance of the said agreement; and that the several parties thereto would truly obey and perform the award to be made in pursuance of the said agreement touching and concerning the several questions and matters aforesaid, so as such award should be made in writing under the hands of the said arbitrators or under the hand of their umpire, and be ready to be delivered to the said parties, or such \*of them respectively as [\*241 should desire the same, on or before the 1st of August then next, or within such further time as the said arbitrators or their umpire should by writing from time to time appoint: Averment, that, the said agreement of reference having been so made as aforesaid, the said arbitrators took upon themselves the said reference, and duly, before they proceeded to the business of the said reference, nominated in writing one J. A. D. Cox to be such umpire as aforesaid; and the said arbitrators duly, by writing under their hands, enlarged the time for making their award in the premises until the 1st of January, 1861, and afterwards, and before the said last-mentioned day, the said arbitrators, not having disagreed, duly made and published their award in writing touching and concerning the several questions and matters so referred to them as aforesaid, ready to be delivered to the said parties; and by the said award the said arbitrators awarded as follows, that is to say, that the sum of 8288*l.* 0*s.* 7*d.* was the total sum of money which ought to be paid to the plaintiff under or by virtue of the said three several

policies of assurance in the said agreement of reference mentioned, in respect of loss or damage occasioned by the said accidental fire mentioned therein to or in the several chattels and things particularized in the said schedules B, C, and C a, in the said agreement of reference mentioned, and that such total sum of 8228*l.* 0*s.* 7*d.* and the said sum of 2771*l.* 19*s.* 5*d.* so agreed to be paid to the plaintiff as in the said agreement mentioned in satisfaction of his claim in respect of the loss or damage occasioned by the said fire to the chattels and things particularized in the schedule A in the said agreement mentioned,—such two sums making together the grand total sum of 11,000*l.*,—ought to be, and they did thereby award, order, and adjudge that the same should be \*242] borne and paid by the said several \*companies in the proportions following, that is to say, the sum of 6000*l.* by the said Liverpool and London Fire and Life Insurance Company, the sum of 2500*l.* by the said Manchester Fire Insurance Company, and the sum of 2500*l.* by the said General Fire Insurance Company; and they further found and decided as a question and matter necessary to be determined for the purposes of that their award, that the loss or damage occasioned to the plaintiff in or in respect of the chattels and things particularized as aforesaid exceeded the sums so insured as aforesaid; and that the whole salvage and proceeds of the salvage of and from the said fire belonged absolutely to the plaintiff, freed and discharged of and from all interest, right, or claim of the said companies respectively therein or thereto: and the said arbitrators further found and awarded that the proceeds of such portion of the said salvage as had been sold, and which proceeds were then in the custody or power of the said companies, should be paid by the said companies to and received by the plaintiff; of all which the said Liverpool and London Fire and Life Insurance Company and the said other companies had notice: Yet, although all things had been done and had happened, and all periods of time had elapsed, necessary to entitle the plaintiff to claim from the said Liverpool and London Fire and Life Insurance Company the performance of the said award on their part, and the sum in this count claimed in respect of the proceeds of the salvage of and from the said fire as thereafter mentioned; and, although after the said fire, and before the making of the said award, the said Liverpool and London Fire and Life Insurance Company took possession of the whole of the salvage of and from the said fire, and sold the same, and received the proceeds thereof, which proceeds, amounting to a large sum, to wit, the sum of 936*l.* 0*s.* \*243] 8*d.* then came \*into the custody and power of the said Liverpool and London Fire and Life Insurance Company, and at the time of the making of the said award were in their custody and power, and thence had continued to be and still were in their custody and power, the said Company neglected and refused to pay over the said proceeds, or any part thereof, to the plaintiff, although they had been requested so to do.

Second plea, to the first count, that all the salvage and the proceeds thereof which was or were ever taken possession of or received by the said Company, or sold by them, was and were the salvage and proceeds upon the said goods in the said schedule A, and not otherwise.

The defendants also demurred to the first count, the ground stated in the margin being, “that the first count of the declaration discloses no

cause of action, and that the arbitrators had no power to award payment by the Company of the proceeds of the salvage." Joinder.

The plaintiff took issue on the defendants' pleas, and also demurred to the second plea, the ground of demurrer stated in the margin being, "that the second plea affords no answer to the first count of the declaration, as it states a fact wholly immaterial to the claim in that count mentioned." Joinder.

*Bovill*, Q. C. (with whom was *R. E. Turner*), for the plaintiff.(a)—The question is as to the right of the \*plaintiff to the salvage [\*244 mentioned in the award. The plaintiff had insured by three several policies,—one for 6000*l.* with the Liverpool and London Fire and Life Assurance Company, another for 2500*l.* with the Manchester Fire Assurance Company, and another for 2500*l.* with The General Insurance Company. A fire happened on the plaintiff's premises, and the damage sustained exceeded the whole amount for which he was insured. That being so, the plaintiff is entitled to receive from the assurers the several sums assured. The defendants now insist that they are entitled to the benefit of the salvage in respect of the property mentioned in schedule A. Independently of the agreement of reference, the plaintiff would have retained his property in the goods damaged by the fire; and there is nothing in that agreement to alter his rights in that respect. [*WILLIAMS, J.*—The defendants liken it to the case of an insurance of a house, barn, and stable, with an agreement of reference ascertaining the amount of damage sustained in respect of the house, and an award giving the assured salvage of the goods in the house which the insurers had already paid for.] It never was intended by the agreement of reference to withdraw the question of salvage from the consideration of the arbitrators, and to make that the property of the defendants: and the Court is not now sitting in review of the arbitrator's decision. [*WILLIAMS, J.*—The agreement of reference states that "it had been agreed between the parties thereto that the claim of the plaintiff, so far as respected the chattels and things particularized as aforesaid in schedule A,"—that is, all the chattels and things alleged by the plaintiff to have been covered by one of the policies, and to have been \*destroyed or injured by or in consequence of the fire,—"should [\*245 be satisfied by means of the payment to him of a sum of 2771*l.* 19*s.* 5*d.*, such sum being the agreed value at the time of the occurrence of the fire of the last-mentioned chattels and things, as the plaintiff did thereby admit." Is the plaintiff to have the value of the goods destroyed or injured by the fire, and the salvage too? That would be giving him more than he was insured for.] The 2771*l.* 19*s.* 5*d.* was agreed to be paid in respect of the damage to the goods mentioned in schedule A. [*BYLES, J.*—Suppose goods worth 2000*l.* are insured for 2000*l.*, and on the happening of a fire the Company take them off the hands of the assured, and pay the 2000*l.*, whose would the salvage be? The award does not state that the plaintiff has sustained more damage than the

(a) The points marked for argument on the part of the plaintiff were as follows:—

"1. That the award mentioned in the first count of the declaration is a good award, and the plaintiff is entitled to recover under it the proceeds of the salvage awarded to him:

"2. That the second plea does not afford any answer to the first count, since, whether the salvage in that count claimed was or was not the salvage of goods mentioned in Schedule A. in the submission referred to, the plaintiff is entitled to recover the amount claimed in the first count."

11,000*l.*, provided the salvage belongs to him.] Whoever has the salvage, the award finds that the plaintiff has sustained damage to an amount exceeding 11,000*l.* [WILLES, J.—You say the insurance is on the whole of the goods, and that the loss in the whole equals or is greater than the value of the 11,000*l.* and all salvage, and therefore that the plaintiff is entitled to the salvage?] Precisely so. If the defendant can satisfy the Court that the arbitrators had no jurisdiction over the salvage, it follows that the salvage remains the property of the plaintiff. The count may be sustained as a count for money had and received.

\*246] *Lush*, Q. C. (with whom was *Raymond*), contra.(a)—\*By the terms of the submission, the goods particularized in schedule A are withdrawn altogether from the consideration of the arbitrators, whose power and jurisdiction are expressly limited to the chattels and things particularized in schedules B, C, and C a. Where goods are insured and a fire happens, and the office, instead of paying the loss, pays the full value of the goods, the office takes the benefit of the salvage. Here, the parties agree that the value of the goods in schedule A at the time of the fire was 2771*l.* 19*s.* 5*d.* The office buys them at that price. The necessary consequence is, that what remains of them belongs to the insurers. It was in effect a purchase of the goods, and not a payment by way of indemnity. All that then remains for the arbitrators to consider, is, what damage the plaintiff has sustained in respect of the goods mentioned in schedules B, C, and C a. They had no power to deal with schedule A at all, except for the purpose of apportioning the amount amongst the several companies.

\*247] \**Bovill*, in reply.—The 2771*l.* 19*s.* 5*d.* was a payment in satisfaction of the damage sustained, not in respect of a sale of the goods. In ascertaining the amount of the damage, the arbitrators were bound to take into account the salvage: and it was competent to them under the terms of the submission to award that to the plaintiff.

WILLIAMS, J.—I am of opinion that the judgment ought to be for the defendant upon the demurrer to the plea. The declaration sets out a submission to arbitration, on which the award has been made which is the foundation of the action. I think it is impossible to adopt the suggestion thrown out by Mr. *Bovill*, that we may treat the count as a count for money had and received. It is a declaration upon the award, and nothing else. Coupling the plea with the declaration, it appears to me that the action is founded upon that part of the award which the

(a) The points marked for argument on the part of the defendant were as follows:—

"1. That, by the agreement of reference, the arbitrators had only a limited power, which they have exceeded, and that the declaration is exclusively founded on that excess:

"2. That the arbitrators had only power to determine what was the total sum to be paid to the plaintiff in respect of loss or damage to the goods mentioned in schedules B, C, and C a, in what proportions the Companies were to satisfy that total sum and the 2771*l.* 19*s.* 5*d.*, and all other questions necessary for the purpose aforesaid, and nothing more:

"3. That the right to the salvage was a question wholly beyond the province of the arbitrators, and therefore that their award as to salvage is wholly void for excess:

"4. That the demurrer to the second plea admits the fact that the proceeds of the salvage sued for were received in respect only of the goods in schedule A; that, inasmuch as the agreed value of these goods had been previously ascertained and settled, no question thereon, nor with respect to the salvage thereupon, could possibly be left for adjudication by the arbitrators, even supposing them to have had any power whatever over salvage: and that the second plea, therefore, furnishes a good answer to the action."

arbitrators had no jurisdiction to make. The facts disclosed upon the record are these:—The plaintiff had effected three policies,—one for 6000*l.* with the Liverpool and London Fire and Life Assurance Company, one for 2500*l.* with the Manchester Fire Assurance Company, and one for 2500*l.* with the General Assurance Company. A fire having happened, the plaintiff's claims against these three companies are referred to arbitration. The agreement of reference recites that the plaintiff had claimed to have made good by the several companies parties thereto or some of them the loss thereby sustained to the chattels and things insured, so far as the said loss was covered by the policies or any of them, and that four schedules severally marked A, B, C, and C a, contained the particulars of all the chattels and things alleged by the plaintiff to have been covered by the said policies or some or one of them, and to have been \*destroyed or injured by the fire. The sub- [\*248 mission then goes on to recite that "it had been agreed between the said parties thereto, that the claim of the plaintiff so far as respected the chattels and things particularized in schedule A, should be *satisfied* by means of the payment to him of a sum of 2771*l.* 19*s.* 5*d.*, *such sum being the agreed value at the time of the occurrence of the fire of the last-mentioned chattels and things, as the plaintiff did thereby admit.*" Thus clearing the ground so far by stating, that, as far as concerns the goods mentioned in schedule A, that sum of 2771*l.* 19*s.* 5*d.* is to be taken, not as satisfaction for the damage sustained, but as a sum covering the whole value of the goods. The submission then goes on to recite that difficulties had arisen respecting the settlement of the said claim of the plaintiff, *so far as the same had not been agreed to be satisfied as aforesaid*,—excluding, therefore, the claim in respect of schedule A so agreed to be satisfied as before mentioned,—and respecting the adjustment of the respective liabilities of the said companies as between or among themselves to the total loss covered by the said policies: and then it proceeds to refer it to the arbitrators named "to award and determine what was the total sum of money which ought to be paid to the plaintiff under or by virtue of the said policies, or any of them, *in respect of loss or damage occasioned by the said fire to or in the said chattels or things particularized as aforesaid in schedules B, C, and C a*, and what were the several proportions in which such total sum, and also the said sum of 2771*l.* 19*s.* 5*d.* agreed to be paid as aforesaid, ought to be borne and paid among or between the several companies." The parties, therefore, have expressly prescribed for what the arbitrators are to take into their consideration, viz., the amount to be paid in respect of the loss or damage occasioned to the chattels and things particularized in \*schedules B, C, and C a exclusively. It then goes on further [\*249 to say that the arbitrators are to determine generally all other questions and matters necessary to be determined for the purposes of the award to be made in pursuance of the said agreement,—that is, all matters relating to the previously recited subjects. The award is to be made in respect of the moneys to be paid in respect of the loss or damage to the chattels mentioned in schedules B, C, and C a. These being the powers and functions of the arbitrators, they proceed to award that 8288*l.* 0*s.* 7*d.* was the total sum of money which ought to be paid to the plaintiff under or by virtue of the said three policies, in respect of loss or damage occasioned by the fire to the chattels and things particularized

in schedules B, C, and Ca; and then they go on to direct that this sum of 8288*l.* 0*s.* 7*d.* and the 2771*l.* 19*s.* 5*d.* so agreed to be paid to the plaintiff in satisfaction of his claim in respect of the loss or damage occasioned by the fire to the chattels and things particularized in schedule A,—making together 11,000*l.*,—should be borne and paid by the three companies in certain proportions. Having thus found that 11,000*l.* is the extreme limit to which they can go, they proceed to decide, “as a question and matter necessary to be determined for the purposes of that their award,” that the loss or damage occasioned to the plaintiff in or in respect of the chattels and things particularized as aforesaid exceeded the sums so insured as aforesaid, and that *the whole salvage and proceeds of the salvage of and from the said fire belonged absolutely to the plaintiff*, freed and discharged of and from all interest, right, or claim of the said companies respectively therein or thereto; and finally they direct that the proceeds of such portion of the salvage as had been sold should be \*250] paid to the plaintiff. Coupling the declaration and the plea \*together, it stands admitted upon the record that the salvage in question was exclusively derived from the goods mentioned in schedule A, and has nothing to do with the other three schedules. It appears to me, therefore, that, in awarding that the plaintiff was entitled to the salvage, the arbitrators have exceeded their jurisdiction. Their power was expressly limited to the chattels mentioned in schedules B, C, and Ca; and they have clearly gone out of their province by taking upon themselves to award anything as to the chattels mentioned in schedule A, which had already been the subject of a final settlement between the parties. That part of the award therefore is void, and cannot be made the foundation of an action.

BYLES, J.—I am of the same opinion. It seems to me that what was due in respect of the loss or damage to the goods mentioned in schedule A had been agreed and decided upon before any reference to arbitration had been determined on at all. The submission to reference recites that it had been agreed between the said parties thereto that the claim of the plaintiff so far as respected the chattels and things particularized in schedule A should be satisfied by means of the payment to him of a sum of 2771*l.* 19*s.* 5*d.*, such sum being the agreed value at the time of the occurrence of the fire of the last-mentioned chattels and things, as the plaintiff did thereby admit. I think we are at liberty to draw two inferences from that recital,—one, that the goods mentioned in schedule A were sold by the owner to the office,—and further, that the sum paid or agreed to be paid in respect of those goods amounted to a complete indemnity to the plaintiff for the loss he had sustained in respect of them. The result is that all matters with regard to schedule A had been finally settled and concluded before the agreement. The \*251] \*Company were to take the goods and pay the stipulated price. Under these circumstances, one would expect to find, and one does find, that all consideration of the matters contained in schedule A is excluded from the jurisdiction of the arbitrators; for, the submission recites that difficulties had arisen respecting the settlement of the claim of the plaintiff *so far as the same had not been agreed to be satisfied as aforesaid*; and then it goes on to provide that the arbitrators shall award and determine what was the total sum which ought to be paid to the plaintiff under the policies in respect of loss or damage occasioned

by the fire to the chattels and things particularized in schedules B, C, and C a., and what were the proportions in which such total sum and also the 2771*l.* 19*s.* 5*d.* agreed to be paid as aforesaid ought to be borne and paid among or between the several companies. This clearly limits the jurisdiction of the arbitrators to the matters contained in schedules B, C, and C a. Accordingly, they find that the loss incurred in respect of the chattels and things in those three schedules amounts to 8288*l.* 0*s.* 7*d.*, which added to the 2771*l.* 19*s.* 5*d.* already ascertained and settled, makes 11,000*l.*, which they proceed to apportion among the several offices. The arbitrators further find, as a thing necessary to be determined for the purposes of their award, that the total loss exceeded the sums insured; and then they go on to award that the whole salvage and proceeds of the salvage of and from the said fire belongs absolutely to the plaintiff, freed and discharged of and from all interest, right, or claim of the said companies respectively therein. If the word "salvage" is used by the arbitrators in the sense of including the chattels and things particularized in schedule A, which had already been purchased and paid for by the insurers, I am clearly of opinion that they have exceeded their \*jurisdiction. I must confess I have not arrived at this conclusion without some fluctuation. But the [\*252 argument of Mr. *Lush* has satisfied me that it is the right one.

KEATING, J.—I agree with my Brother Williams and my Brother Byles that the intention of the parties was to withdraw from the arbitrators all consideration of the things which formed the subject of schedule A, the plaintiff's claim in respect of which had already been settled and ascertained at the sum of 2771*l.* 19*s.* 5*d.* That being so, all that remained for the arbitrators to do, was, to ascertain the amount of the plaintiff's claims in respect of the things mentioned in schedules B, C, and C a, and to apportion that when ascertained, as well as the 2771*l.* 19*s.* 5*d.*, amongst the several companies, in proportion to the sums respectively insured by them. The dealing, therefore, with any salvage in respect of the goods in schedule A would clearly be an excess of jurisdiction.

My Brother Willes, before leaving the Court, desired me to say that he entirely agrees in this view.

WILLIAMS, J.—The majority of the Court think that the defendant should have judgment upon the demurrer to the declaration, as well as on the demurrer to the plea. Judgment for the defendant.

**\*HUNT and Others v. ALLGOOD and Others. April 20. [\*253**

Certain parish lands had been let to the labouring inhabitants at a forehand rent of 4*s.* per acre: the lands having been afterwards enclosed, the churchwardens and overseers for the time being increased the rent to 12*s.* per acre, for the purpose of raising a fund to pay the expenses of the enclosure. The tenants, having paid this increased rent for many years, conceiving that the enclosure expenses had been paid off, insisted that they were entitled to hold the land at the original rent of 4*s.* an acre, and refused to pay the 12*s.*:—Held, that this did not amount to a disclaimer of the landlords' title, so as to enable them to eject the tenants without notice.

And, *semble*, that a tenancy from year to year might be implied from the circumstances under which the parties had held.

THIS was an action of ejectment brought by the plaintiffs, the church-

wardens and overseers of the parish of Coton, in the county of Cambridge, to recover possession of certain lands belonging to the church and town estate charity, in the parishes of Coton and Barton, of which the churchwardens and overseers for the time being were trustees.

The cause was tried before Pollock, C. B., at the last Summer Assizes at Cambridge. The defendants, who were labouring men of the parish of Coton, had occupied the lands in question for many years under the churchwardens and overseers for the time being, taking from Michaelmas to Michaelmas at a forehand rent. Originally the rent paid for the land was at the rate of 4s. per acre: but, the lands having been dealt with under an enclosure Act 39 G. 3, c. 117 (local) in order to raise a fund for paying the expenses of the enclosure, the rent was raised to 12s. per acre,—subject, as it was said, to an understanding, that, when these expenses had been paid off, the lands should be let again at the old rent of 4s. The principal evidence relied on to show that the holding was for a year, and the rent a forehand rent, was that of the defendant Allgood, who held half an acre, and who said,—“As I paid each 6s., I considered I was entitled to hold for another year.”

About the year 1848, the tenants of these lands conceiving that they ought no longer to pay the advanced rent, claimed to hold them under  
\*254] the old terms; and no rent was in fact paid since. The churchwardens \*and overseers thereupon gave the tenants notice to quit, which however turned out to be insufficient; and at the trial it was insisted on their part that the tenancy being for one year only at each letting, and the defendants having disclaimed the title of their landlords, the latter were entitled to recover without any notice.

Under the direction of the Lord Chief Baron, a verdict was entered for the plaintiffs, leave being reserved to the defendants to move to enter a nonsuit; the Court to be at liberty to draw any inferences of fact which a jury should have drawn from the evidence.

*Power*, Q. C., in Michaelmas Term last, obtained a rule nisi accordingly. He cited *Doe d. Gray v. Stanion*, 1 M. & W. 695,† and *Doe d. Graves v. Wells*, 10 Ad. & E. 427 (E. C. L. R. vol. 37), 2 P. & D. 396.

*O'Malley*, Q. C., *David Keane*, and *Couch*, now showed cause.—The evidence given at the trial was not consistent with any other than a prospective hiring for each year, and therefore no notice to quit was necessary. Besides, the evidence shows that the defendants were setting up a title hostile to the title of the plaintiffs, and so their interest, whatever it was, became forfeited: *Saunders v. Freeman*, Dyer 209 a. There, “the conusee brought a quid juris clamor against the lessee, supposing him to be a termor only, and he claimed the freehold: and for this cause judgment was given that the term by this claim shall be forfeited.” In *Doe d. Ellerbrock v. Flynn*, 1 C. M. & R. 137,† where a tenant for a term of years under a lease delivered up possession of the premises and the lease, in fraud of his landlord, to a person who claimed under a hostile title, with the intention of enabling him to set up his  
\*255] hostile title, not with the intention \*that he should hold under the lease, it was held that the term was forfeited. “If,” said Lord Lyndhurst, “a tenant sets up a title hostile to that of his landlord, it is a forfeiture of his term; and it is the same if he assists another person to set up such a claim. Whether he does the act himself, or only colludes with another to do it, it is equally a forfeiture.” If the landlord has

title to the land, he has a right to prescribe the amount of the rent; and the tenant who claims a right to reduce it is in effect setting up a title hostile to that of his landlord. In *Doe d. Calvert v. Frowd*, 4 Bingh. 557 (E. C. L. R. vol. 13), 1 M. & P. 480, the defendant, who held under a tenant for life, received on her death a letter from the lessor of the plaintiff, claiming as heir, and demanding rent. The defendant answered that he held the premises as tenant to S.; that he had never considered the lessor of the plaintiff as his landlord; that he should be ready to pay the rent to any one who should be proved to be entitled to it, but that, without disputing the lessor of the plaintiff's pedigree, he must decline taking upon himself to decide upon his claim, without more satisfactory proof in a legal manner: and it was held that this was a disclaimer of the lessor of the plaintiff's title. Best, C. J., there says: "When the lessor of the plaintiff demands his rent, the defendant says, 'I will not pay; I am tenant to Smallpiece;' and at the trial puts the lessor of the plaintiff to prove his title. If this be not disclaimer, What is?" In *Doe d. Gray v. Stanion*, 1 M. & W. 695,† there was no act done by the defendant, and the conversation relied on did not amount to a direct repudiation of the relation of landlord and tenant, nor any claim to hold the estate upon a ground wholly inconsistent with the existence of that relation, which by necessary implication was a repudiation of it. Doubtless the disclaimer here was not so direct as was that in *Doe d. \*Graves v. Wells*, 10 Ad. & E. 427 (E. C. L. R. vol. 37), 2 P. & D. 396: but, in the course of the judgment, [\*256 the distinction between the determination of a tenancy for a term of years and the ending of a tenancy from year to year without a notice to quit was pointed out. Lord Denman said: "I think *Doe d. Ellerbrock v. Flynn* is distinguishable from the present case. There it was thought that the tenant had betrayed his landlord's interest by an act that might place him in a worse condition: if the case went further than that, I should not think it maintainable. The other instances are cases either of disclaimer upon record, which admit of no doubt as to the nature of what is done, or of leases from year to year, in speaking of which the nature of the tenancy has been sometimes lost sight of, and the words 'forfeiture' and 'disclaimer' have been improperly applied. It may be fairly said, when a landlord brings an action to recover the possession from a defendant who has been his tenant from year to year, that evidence of a disclaimer of the landlord's title by the tenant is evidence of the determination of the will of both parties, by which the duration of the tenancy, from its particular nature, was limited." And Patteson, J., said: "It is sometimes said that a tenancy from year to year is forfeited by disclaimer: but it would be more correct to say that a disclaimer furnishes evidence in answer to the disclaiming party's assertion that he has had no notice to quit; inasmuch as it would be idle to prove such a notice where the tenant has asserted that there is no longer any tenancy." Suppose at the end of the year the tenant neither brought his rent nor took possession of the land, would he on the first day of the next year have been liable to be sued for the fore-hand rent for that year? If the tenancy were a continuing tenancy, as suggested, that would be so. But there was no pretence for saying [\*257 that it was more than a \*tenancy for each year. It was admitted

that the tenancy, if any, was a tenancy at 12s. a year: and that was clearly repudiated by the defendants.

*Power*, Q. C., *Tozer*, Serjt., and *Douglas Brown*, in support of the rule.—The declarations relied upon as amounting to a disclaimer of the plaintiffs' title were in truth no more than a strong expression of opinion on the part of the tenants that the rent ought to be reduced to the ancient sum of 4s. There was nothing to indicate any intention on their part to set up a title to the freehold in themselves or in any other person.

ERLE, C. J., stopping *Power*.—I am of opinion that the rule to enter a nonsuit in this case should be made absolute. The Lord Chief Baron, instead of himself deciding the matter, and leaving the plaintiffs to move, thought fit to reserve it for the Court to say what is the law, and what the proper inferences to be drawn from the facts proved before him. Two points were relied on for the plaintiffs. The first was, that the defendants did not hold the land as tenants from year to year, but only for one year certain, and consequently that the interest of each occupant was determined at the end of each year. I have looked carefully at the evidence; and I take the facts proved to have been substantially these:—Many years back the defendants became the occupants of the land in question, and at the commencement of each year paid the year's rent in advance. The rent has been accepted for very many years; and there is no proof of anything to create a right in the landlords at the end of any one year to expel the tenants. Ordinarily speaking, an occupation of premises for more than a year, and payment and acceptance of rent, creates a tenancy from year to year. And the \*258] inference which I draw from \*the facts submitted to us, is, that these persons held as tenants from year to year. The plaintiffs then claimed a right to succeed on the further ground that there had been a disclaimer by the defendants of the title of the plaintiffs, by the latter claiming a right in themselves inconsistent with their landlords' right. Now, as to this, the facts were, that, originally, the rent paid for the land was 4s. per acre; that, about sixty years ago, funds being required to pay the expenses of the enclosure of the land, the rent was increased to 12s. per acre; that, when enough had been raised in this way to satisfy the enclosure expenses, a notion existed amongst these people that the rent ought to be reduced to the sum which had formerly been paid; and that, at a meeting held in the vestry-room of the parish, at which the defendants were present, words were used making a semblance of a claim of right by them,—in substance "that the land was theirs at 4s. an acre." It was supposed that this amounted to a claim by them to have an estate in the land which was inconsistent with the right of the plaintiffs,—a claim, in spite of the landlords' title, to continue to hold the land at 4s. an acre. But, when we look at the circumstances under which the words were used, it appears to me that their more probable meaning was, an assertion of a right to continue their tenancy under the plaintiffs at the rent of 4s. This is much more likely than that they meant to claim an estate in themselves adversely to and inconsistent with the right of their landlords. Further, I am of opinion that it would not be satisfactory to turn out thirty-six tenants upon such loose evidence as this,—that, at a parish meeting, some of the parties being present said something which might be construed into

a repudiation of the title of the plaintiffs. We have no means of arriving at a safe conclusion as to who used the \*expressions [259] relied on, or whether all the defendants assented to and adopted them. Upon the whole, I cannot bring my mind to the conclusion that there is any evidence upon which we would be justified in adjudging that the defendants had forfeited their interest. I am therefore of opinion that the rule to enter a nonsuit should be made absolute,—the defendants being tenants from year to year at a rent of 12s. per acre.

The rest of the Court concurring,

Rule absolute.

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NASH, Administrator with the Will annexed of JOHN BEATSON, deceased, v. ARMSTRONG. May 11.

An agreement between the administrator of the covenantee and the covenantor, not to enforce performance of the covenants in the deed provided the latter would pay certain rent, may be a good consideration for a parol promise to pay such rent; and the enforcement of such promise is not open to the objection that it is seeking to vary by parol the terms of an instrument under seal.

And, *semble*, per Willes, J., that a recovery in such an action would afford a good equitable plea in bar to an action on the deed for the same rent.

THE declaration stated, that, by deed dated the 29th of February, 1860, the said John Beatson, being then possessed thereof for a term which had not yet expired, let to the defendant certain rooms, part of a house of the said John Beatson, therein described, from the 1st of March in that year to the 24th of June in that year, at rent to be ascertained by two valuers, one on the part of the said John Beatson, and one on the part of the defendant, or an umpire to be agreed on by the said two valuers, such rent to include the use of the fixtures and fittings then in and upon the said demised premises, and which then belonged to the said John Beatson, the expense of the valuer to be employed by the said John Beatson, to be paid in the first instance by the defendant, and retained by \*him out of the rent for the said [260] demised premises accruing due from him on the said 24th of June, 1860; and afterwards the said valuers were respectively accordingly duly appointed, but did not, without any default of the said John Beatson or the plaintiff in that behalf, ascertain the rent so to be paid as aforesaid, or appoint any umpire; and the defendant, nevertheless, at his request, occupied the said rooms under the said demise until the said 24th of June, and afterwards as tenant thereof to the plaintiff as administrator as aforesaid, for a long time, to wit, until the 1st of September, 1860, the said John Beatson having previously died: that afterwards, and whilst the amount of rent to be paid by the defendant for and in respect of his said occupation of the said rooms to the said 24th of June, and thence to the said 1st of September, was and remained unascertained and not agreed upon, and unpaid, it was, at the defendant's request, mutually agreed between the plaintiff as administrator as aforesaid, and the defendant, that, if the plaintiff, as administrator as aforesaid, would not insist upon such valuation as aforesaid, and would not require that the said valuers should be called upon to appoint an umpire to ascertain the amount of the said rent to be paid for the de-

defendant's said occupation until the said 24th of June, and that the said valuers should be instructed not to appoint such umpire as aforesaid, the defendant would pay to the plaintiff, as administrator as aforesaid, for and in respect of his occupation of the said rooms under the said deed, and for and in respect of the said subsequent occupation thereof as tenant to the plaintiff as administrator as aforesaid, a reasonable sum in that behalf, to wit, the sum of 70*l.*: and that neither the plaintiff as administrator as aforesaid nor the defendant should ever call upon the other of them to carry out or perform or fulfil the terms of the said \*261] deed: Averment, that the plaintiff did everything, and \*everything existed and had before suit happened to entitle the plaintiff, as administrator as aforesaid, to payment of the said sum of money last mentioned, to wit, 70*l.*: Breach, that no part thereof had been paid.

To this count the defendant demurred, the ground of demurrer stated in the margin being, "that a contract under seal cannot be varied or discharged by a parol agreement." Joinder.

*R. G. Williams*, in support of the demurrer.(a)—There is no valid consideration for the promise stated in the declaration. [WILLIAMS, J.—Why is it not a good consideration in assumpsit, that the plaintiff foregoes his rights under the deed?] It is varying by parol the terms of a deed. [WILLIAMS, J.—That is not so.] By the parol agreement the defendant is to pay the rent ascertained in a way different from that provided by the deed. [WILLIAMS, J.—The plaintiff is seeking to \*262] enforce an agreement founded upon a \*consideration that the plaintiff will not put in force his rights under the deed.] A deed can only be varied by deed. Would a recovery in this action be pleadable in bar to an action upon the deed? [WILLES, J.—I should have thought it a good answer by way of equitable plea. The payment of the 70*l.* under the agreement would surely be ground for an unconditional perpetual injunction against proceeding upon the deed.] The declaration, it is submitted, must be treated as it would have been before equitable pleas were known. Most of the cases upon this subject are cases where the parol agreement is set up as an answer to an action on the deed: but the grounds of the decision in *White v. Parkin*, 12 East 578, are strongly in favour of the proposition contended for here. There, the plaintiffs having contracted by charter-party sealed to let a ship, then in the Thames, to freight to the defendants for eight months, to commence from the day of her sailing from Gravesend on the voyage there stated, and having covenanted that she should sail from the Thames

(a) The points marked for argument on the part of the defendant were as follows:—

"1. That the plaintiff by the first count is seeking to recover upon a deed as varied by a parol agreement, whereas a deed can only be varied by a deed:

"2. That the alleged agreement could be carried out by deed only, and there is no allegation of the execution of any such deed:

"3. That the matters alleged in the first count disclose a claim which can be enforced only in equity, and not at law:

"4. That there is no consideration for the alleged agreement, if it is to be considered as independent of the deed:

"5. That the alleged agreement would afford no answer to an action upon the deed, or prevent the plaintiff from calling upon the valuers to appoint an umpire, or upon the defendant to carry out the terms of the deed, and the consideration for it is wholly nugatory:

"6. That the alleged agreement is in the nature of an accord only, and cannot be enforced or acted upon."

to any British port in the English Channel, there to load such goods as the freighters should tender, and sail to the West Indies, and bring back a return cargo to London,—afterwards agreed by parol with the defendants that the ship, instead of loading at some port in the Channel should load in the Thames, and that the freight should commence from her entry outwards at the Custom House: and it was held that this subsequent parol contract was distinct from and not inconsistent with the contract by deed, being anterior to it in point of time and execution, and might therefore be enforced by action of assumpsit. Lord Ellenborough, in giving judgment, said: “The parol agreement merely borrowed some of the terms of the charter-party by reference to it, but does not contradict or dispense with it. There is no real repugnance between \*the two contracts, but the two may well subsist together.” In [\*263 the present case, it cannot be contended that the parol agreement does not conflict with the deed. There is an utter repugnance between the two instruments. In the course of the argument in *White v. Parkin*, a case of *Leslie de la Torre* was cited, where Lord Kenyon ruled that the agreement by charter-party being under seal, the plaintiff could not set up a parol agreement inconsistent with it, and which in effect was meant in a certain extent to alter it. [WILLIAMS, J.—The difficulty in your way is, that there is here an undertaking on the plaintiff’s part to forbear from enforcing the payment of rent under the deed.] A rent would be payable under the deed, to which this agreement would be no answer. *White v. Parkin*(a) was cited and approved of in *Thompson v. Brown*, 7 Taunt. 656, 672 (E. C. L. R. vol. 2). In *Gwynne v. Davy*, 1 M. & G. 857 (E. C. L. R. vol. 39), 2 Scott N. R. 29, 9 Dowl. P. C. 1, by a deed of the 18th of April, 1838, the defendants contracted to employ the plaintiff in the management of certain chemical works for the term of seven years from the 30th of June then next, with a proviso, that, if a process for making a certain quantity of sulphate of quinine, on which the plaintiff was then engaged, should not be in operation upon the 21st of June, then the defendants should on or at any time after that day have power to determine the contract by notice in writing. On the 9th of August, 1838, a second agreement in writing, *but not under seal*, was entered into between the parties, which, after stating that the plaintiff had not succeeded in producing the sulphate of quinine as stipulated in the deed, extended the period for its production until the 21st of December, 1838. The plaintiff having brought assumpsit upon the second \*agreement, for a breach of [\*264 stipulations contained in the deed,—it was held that the action could not be maintained, the second agreement being merely an agreement for the extension of the time mentioned in the deed, and not an agreement incorporating the terms of that deed, which was still in force. Tindal, C. J., says: “According to my understanding of this agreement, it is simply an extension of the time for the production of the stipulated quantity of the sulphate of quinine, leaving the deed itself in full force. I cannot distinguish this case from those in which it has been laid down, that, where an act is required by deed to be done against a certain time, you cannot show that the period has been extended, except by some instrument also under seal.” [WILLIAMS, J.—There was no undertaking there to forbear to put in suit the original contract. In

(a) *Leslie v. De la Torre*?

Gwynne v. Davy, Maule, J., says: "The declaration sets out an agreement under seal between the parties, upon which, as a matter of course, an action of covenant would be the proper remedy, and not assumpsit. That deed does not contain any covenant on the part of the plaintiff to produce the stipulated quantity of sulphate of quinine within a given period, but merely reserves to the defendants power, in the event of the plaintiff's experiments not producing a successful result within the time specified, to put an end to the contract by notice in writing. The parties then come to a second agreement, whereby the defendants agree to abstain from exercising their power of determining the contract until the 21st of December, 1838. The defendants might possibly be liable to an action of assumpsit if they had committed a breach of their second agreement. But the plaintiff has thought proper to bring assumpsit on the original deed, which it is clear he cannot do." ] A deed cannot be varied in any way by parol; and no action can be maintained on a parol agreement, which varies the deed. In the case of a contract for the sale of goods within the 17th section of the Statute of Frauds, where another day for payment has been by parol substituted for that originally fixed by the contract, it has been held that the subsequent parol agreement cannot be made the foundation of an action: *Marshall v. Lynn*, 6 M. & W. 109;† *Mechelen v. Wallace*, 7 Ad. & E. 49 (E. C. L. R. vol. 34), 2 N. & P. 224; *Stead v. Dawber*, 10 Ad. & E. 257 (E. C. L. R. vol. 37). In *Chitty on Contracts*, 6th edit. 55, it is said: "If there be an entire consideration for the defendant's promise made up of several particulars, and one of these consist of an agreement by the defendant which the Statute of Frauds requires to be in writing, and which for want of such writing is void, the whole consideration is void, and the promise cannot be supported." Here, there would be nothing to prevent the plaintiff from bringing an action upon the deed, even after the money was paid under the agreement. To allow this declaration to be good would be promoting circuitry of action.

*Raymond*, for the plaintiff, was not called upon.(a)

\*266] \*WILLIAMS, J.—I am of opinion that there should be judgment for the plaintiff on this demurrer. I do not think it necessary to dispute the correctness of many of the doctrines contended for in the argument; for, I do not consider that the conclusion we have arrived at in any degree conflicts with any of the rules of law adverted to. On the face of this declaration there is an admitted promise by the defendant to pay a certain sum of money at a stipulated time, and an admitted breach of that promise. That is a perfectly good promise if founded upon a sufficient legal consideration: and the simple question is, whether there is a sufficient legal consideration disclosed on the declaration. I am of opinion that there is. It appears upon the face of

(a) The points marked for argument on the part of the plaintiff were as follows:—

"1. That the contract disclosed by the first count does not infringe upon the rule that a contract under seal cannot be varied by parol agreement:

"2. That, although a contract under seal cannot be varied by parol, yet that it is competent to the parties to it to enter into a fresh agreement by parol, and for a good consideration, not to put in force the original contract:

"3. That the contract declared on is collateral to that entered into by the deed, and leaves the force of the deed itself intact, and amounts merely to an agreement not to enforce the performance of the original contract under seal:

"4. That such new contract is founded upon a good consideration, and is therefore valid."

the declaration that the plaintiff, as the personal representative of the original contracting party, being in a condition to bring an action upon the original contract, or otherwise to put it in force, in consideration of his abstaining from enforcing the rights conferred on him by that contract, the defendant promised to pay in respect of the occupation of the premises under the deed referred to, and in respect of his subsequent occupation thereof as tenant to the plaintiff as administrator, a reasonable sum. It was not necessary, in order to make that a good consideration, that the mutual promises should amount to a release of the right of action flowing from the original contract. The plaintiff, having a right to enforce the benefits conferred on him by the contract, enters into an agreement not to do so, whereby he changes his situation to this extent, that, whereas before he had a right to sue upon the deed, if he now exercises that right he renders himself liable to an action. He has, therefore, plainly given a good consideration for the defendant's promise, and there is a complete cause of action disclosed on the face of the \*declaration. Upon principle, this is in truth nothing more [\*267 than the ordinary case to be found in the old books, of an action against an heir whose ancestor has made a bond binding himself and his heirs, and who has assets by descent: if he contracts with the obligee of the bond, that, if the latter will forbear to put the bond in suit, he will pay the sum secured by a given day,—that is a good assumpsit, and the forbearance till the day named is a good consideration to support the promise. The bond is not released by that. The only result is, to subject the obligee to an action if he puts the bond in suit before the expiration of the time agreed on. To that extent the terms of the bond are varied, and yet the bond remains unreleased: nevertheless, the consideration which flows from the agreement of the obligee not to put the bond in suit is good, and furnishes a ground of action if it is broken. That principle is applicable here.

WILLES, J.—I am entirely of the same opinion. It appears to me that this declaration is neither open to the objection that it is an attempt to vary by parol the terms of a deed, nor to the objection that it is an action upon an accord.

BYLES, J.—I had at first some doubt whether the maxim *Unumquodque dissolvitur eodem legamine quo ligatur*, was not applicable here; for, till satisfaction, the plaintiff might always have an action upon the deed, and one cannot but see that this would lead to circuitry of action. Further, whatever may be the value of the decision in *Leslie v. De la Torre*, the reported observations of Lord Kenyon are very much in favour of Mr. *Williams's* argument. But *Gwynne v. Davy* is not so. Three of the Judges there intimate an opinion that an action might be maintained on the parol \*agreement. And no other authorities [\*268 have been cited to show that the rule is applicable to a cross-action, and is not confined to an action on the deed.

KEATING, J.—I concur with the rest of the Court in thinking that the declaration discloses a promise founded on a good consideration, and that it is not open to the objection that the plaintiff is seeking by parol to vary the terms of an instrument under seal.

Judgment for the plaintiff.

## WEBB v. BIRD and Others. April 26.

The owner of a windmill cannot claim, either by prescription, or by presumption of a grant arising from twenty years' acquiescence, to be entitled to the free and uninterrupted passage of the currents of wind and air to his mill.

And such a claim is not within the 2d section of the 2 & 3 W. 4, c. 71, which is confined to rights of way or other easements to be exercised upon or over the surface of the adjoining land.

THE declaration stated, that, before and at the times of committing the grievances thereafter mentioned, the plaintiff was possessed of a certain windmill and premises, with the appurtenances, in Emmeth, and the plaintiff before and at the said times of right ought to have had and enjoyed, and still of right ought to have and enjoy *the benefit and advantage of the streams and currents of air and wind which had used to pass, run, and flow*, and during all that time of right ought to have passed, run, and flowed, and still of right ought to pass, run, and flow *from the west*, in the usual and proper passage, course, and flow of the same, *unto the said windmill*, for supplying the same with air and wind for working, using, and enjoying the same: That the defendants afterwards, \*269] while the plaintiff \*was so possessed, wrongfully and injuriously built and erected a certain school-house and premises near to the plaintiff's said windmill and premises, and thence hitherto wrongfully and injuriously had kept and continued the same erected there, and thereby during all that time *wrongfully and injuriously stopped, obstructed, and diverted the streams and currents of air and wind which ought to have passed, run, and flowed from the west to the said windmill* and premises of the plaintiff, and turned and diverted the said streams and currents of air and wind from the said windmill and premises of the plaintiff: By means of which said several premises the plaintiff during all the time aforesaid was hindered and prevented from using the said windmill and premises in so ample and beneficial a manner as he otherwise might and would have done, and the said windmill and premises of the plaintiff became and were and are thereby much injured and deteriorated in value: Claim, 300l.: And the plaintiff also claimed a writ of injunction against the repetition or continuance of the said injury, and of any injury of a like kind, relative to the said property or right.

The defendants pleaded,—first, not guilty,—secondly, that the plaintiff ought not of right to have had and enjoyed, and ought not of right to have and enjoy, the said benefit and advantage of the said streams and currents of air and wind, as alleged; and that the said streams and currents of air ought not of right to have passed, run, and flowed, and ought not to pass, run, and flow, as alleged, and for the purposes alleged,—thirdly, that they did what was complained of by the leave and license of the plaintiff.

Issue was joined upon each of these pleas; and, by an order made at the Spring Assizes at Norwich, in 1860, a verdict was by consent entered \*270] for the \*plaintiff for 40s. damages and 40s. costs, subject to the award of a barrister, who was to be at liberty to award and direct for whom and for what sum the verdict should be finally entered, and who was to be at liberty to raise the question of law as to the right of the plaintiff at any stage of the proceedings which he should deem

best, and also be at liberty either to suspend any final award until after the decision of the Court upon such question or to make his award subject thereto; and, if he should in the end decide in favour of the plaintiff, he should then say what was to be done between the parties, so as to bind the right between them,—the costs of the cause to abide the event of the reference thereof thereby made, and the costs of the reference and award to be in the discretion of the arbitrator, who was to decide by whom and to whom and in what manner the same should be paid.

The arbitrator on the 15th of October made his award as follows:—

“Now, I the said arbitrator, having taken upon myself the burthen of this reference, and having duly weighed and considered the several allegations of the said parties, and the proofs which have been given in evidence before me, do hereby make and publish my award in writing of and concerning the matters above referred to me, as follows, that is to say,—As to the issues firstly and thirdly joined in the cause, I award and adjudge that the verdict which has been entered for the plaintiff do stand, with 40s. damages: And, as to the issue secondly joined in the said cause, I award and find, that, in the year 1856, the plaintiff became, and from thence hitherto hath been and still is, the owner and occupier of the windmill and premises in the declaration mentioned; that the windmill was built in the year 1829; that, from the time it was so built, until the school-house and premises in the declaration \*also mentioned were built by the defendants, the streams and currents of [\*271 air and wind passed, ran, and flowed without interruption from the west to the said windmill, and supplied the said windmill with air and wind for working, using, and enjoying the same, and were in fact during all that time used and enjoyed for that purpose by the occupiers of the said windmill as of right and without interruption: And I further award and find, that, in the month of August, 1859, the defendants commenced to erect and build, and in the month of January, 1860, they completed the erecting and building of the said school-house and premises near to the plaintiff's said windmill and premises, that is to say, at the distance of twenty-five yards from the same, and that the said school-house and premises stopped, obstructed, and diverted the streams and currents of air and wind which would otherwise have passed, run, and flowed from the west to the said windmill and premises of the plaintiff, whereby the working of the said windmill was injured, and the said windmill and premises became injured and deteriorated in value; and, if the Court shall be of opinion that the plaintiff ought of right to have and enjoy the benefit and advantage of the said streams and currents of air, I award that the verdict which has been already entered for the plaintiff upon the second issue joined in the said cause, with 40s. damages, do stand; but, if the Court shall be of a contrary opinion, then I award that the verdict already entered for the plaintiff so far as relates to the said second issue be set aside, and that, instead thereof, a verdict be entered for the defendants upon such second issue: And I also award and adjudge, that, if the Court shall decide in favour of the plaintiff, the defendants do pay unto the plaintiff the sum of 175*l.* in full satisfaction and discharge of all damages which since the erection \*of [\*272 the said school-house and premises the said plaintiff has sustained, or which he, his heirs or assigns, or his or their tenants, owners

or occupiers of the said windmill and premises, may hereafter sustain by reason of the erection of the said school-house and premises; and that, on payment of the said sum of 175*l.*, the said plaintiff do make and execute to the said defendants, at their expense, a release of his right as alleged in the said declaration, so as to bind the same: And I further award and adjudge that the plaintiff do in the first instance pay to me the said arbitrator my costs and the costs of this my award, and that the defendant do repay to the plaintiff one moiety of the said costs: And, if the said Court should decide in favour of the plaintiff, then I award and adjudge that the defendants do pay to the plaintiff his costs of this reference: but, if the said Court shall decide in favour of the defendants, then I award and adjudge that each of the said parties do bear and pay his and their own costs of this reference: And I also find, award, and certify that it appeared to me at the hearing of the matters so referred to me, that there was a sufficient reason for bringing the said action in the Court in which the same was brought, and that the cause was proper to be tried before a Judge of the superior Courts, and not before the Judge of an inferior Court, and that I ought so to certify on the back of the said record, if so necessary, to enable the plaintiff to have judgment to recover his costs herein.”(a)

*David Keane* (with whom was *Bulwer*), for the plaintiff.—The question is whether the plaintiff is entitled to have the free and uninterrupted \*273] access to \*his ancient mill of the currents of wind and air which are essential to its use. Little direct authority is to be found in the books upon the subject. Two cases, however, are referred to in *Gale on Easements*, 2d edit. 197, 198, which go far to establish the plaintiff's claim. The first is an Anonymous Case in *Winch's Reports*, 3 (cited *Vin. Abr. Nuisance (G)*), pl. 19, where “Winch said that it was adjudged in this Court (Common Bench), that, where one erected a house so high in *Finsbury Fields* by the windmills that the wind was stopped from them, that it was adjudged in this case that the house shall be broken down.” The other case is in *Rolle's Abridgment, Trial*, pl. 23, “en un assize de nusans port pur ceo que levavit domum ad nocumentum de son melyn, per que le vent est estoppe a vener a son melyn issint que ne poet moulder, &c.: et le jurie trove que le defendant ad erect un mease de novel, et que forsque 2 yards del toppe del mease est al nusans: ceo est trove pur le plaintife, car ici le declaration nest falsifie mes solement abridge; et le judgment serra que les 2 yards serront deject. M. 11 J. B. enter Goodman et Gore et auters adjudge.”(b)

(a) The arbitrator has not said what shall become of the “40*l.* damages” he has awarded to the plaintiff on the first and third issues, in the event of the Court deciding that the plaintiff had no cause of action.

(b) The case in M. 11 Jac. is *Trahern's Case*, in *Godbolt* 233. *Goodman and Gore's Case*, *Godbolt* 189, is a totally different case. It is there said that “Goodman brought an assize against Gore and others for erecting of two houses at the west end of his windmill per quod ventus impeditur, &c.: and it was given in evidence that the said houses were situate about eighty feet from the said mill, and that in height it did extend above the top of the mill, and in length it was twelve yards from the mill: and, notwithstanding this nearness, the Court directed the jury to find for the defendant.”

*Trahern's Case* is as follows:—“An assize of nusans was brought against the defendant, because that levavit quendam domum ad nocumentum, &c. And the plaintiff showed how that he had a windmill, and that the defendant had built the said house so as it hindered his mill: and the jury found that the defendant levavit domum, and that but two feet of it did hinder the plaintiff's mill, and is ad nocumentum. And how judgment should be given was the question.

The subject, as regards water-mills, \*is treated in Pardessus, [\*274 *Traité des Servitudes*, pp. 229–239. [BYLES, J.—It appears on the award that this mill was erected in the year 1829. You must depend upon the 2 & 3 W. 4, c. 71. Upon which section do you rely?] The 2d, which enacts “that no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any way or other easement, or to any watercourse, or the use of any water, to be enjoyed or derived upon, over, or from any land \*or water of our said [\*275 lord the King, his heirs or successors, or being parcel of the Duchy of Lancaster or of the Duchy of Cornwall, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing.” [ERLE, C. J.—The easement claimed here, as in the cases in *Winch and Rolle’s Abridgment*, is, not a way or other easement to be enjoyed or derived “upon, over, or from any land,” but the benefit of the streams and currents of air and wind to the plaintiff’s mill. All the easements mentioned in s. 2, are, something to be enjoyed upon the surface of the land.] The object of the statute was to embrace all easements known to the law. The surface of the land may be said to be the base of the channel of air to the enjoyment of which the plaintiff is entitled. [BYLES, J.—Did windmills exist in the time of Ric. 1? If not, there could be no prescription in the two cases you cite. WILLES, J.—It might be that the parties owed suit to the mill. ERLE, C. J.—I think it is abundantly clear that Lord Tenterden meant to limit the 2d section to easements to be enjoyed upon the land; for, he provides for light in \*the 3d section, which enacts, that, “when the access [\*276 and use of light to and for any dwelling-house, workshop, or other

And the Court was of opinion that judgment should be that but part of the house should be abated, viz. that which was found to be *ad nocumentum*. And it was said by some that the *assize* is such a writ which extends to the whole house, and therefore that the whole house should be abated according to the writ. But a difference was taken betwixt the word *erexit* and *levavit*; for, *erexit* is but when parcel of a house is set up *ad nocumentum*, but *levavit* is when an entire house is levied from the ground. And it was said by Hobart, Chief Justice, that, if the defendant had not levied the house so high by two yards, it had been no *nusans*; for, the jury find that the two yards only are *ad nocumentum*: and therefore he conceived that the writ was answered well enough, and that but part of the house should be abated; for, the writ is, *Quod levavit quandam domum, &c.* And the verdict is, *Quod levavit domum*, but that but two yards of it is *ad nocumentum*: and therefore he said the writ is answered well enough, and that the judgment should be given that that only should be abated which was *ad nocumentum*, &c. *Quære*, for the case was not resolved. And vide *Batten and Sympson’s Case*, 9 Co. Rep. 53 b, to this purpose.”

In *Batten v. Sympson*, 9 Co. Rep. 53 b, the complaint was, that the defendant erected a house so near to the plaintiff’s house that the eastern part thereof “*superpendit, anglicè, doth jut over, the said messuage of the plaintiff, in latitudine 17 inches, and in longitudine 17 feet, ad nocumentum liberi tenementi,*” &c.

building, shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing." Light was probably put into a separate section because it was intended to make the right indefeasible after a certain time. In Wood's Institute of the Civil Law, Book 2, c. 2, p. 147, the *negative* services which by the Civil Law a man owed to his neighbour, are thus defined,—“1. That he shall not turn the droppings of the eaves of his house upon my house or ground. 2. That he shall not darken my windows by building or otherwise. 3. That he shall not hinder my prospect by building or planting of trees. 4. That he shall not make any windows to overlook me, and by that means take away the privacy which every man desires in his dwelling. If I have no service upon him in this instance, he may make as many windows as he pleases, but then I may erect sheds against them and so make them useless, except the windows have been time out of mind. 5. And, lastly, that he shall not build his house higher without my leave; otherwise, of common right, he may build as high as he thinks fit, though my windows are darkened by it. Yet he ought not (generally speaking) to build contrary to the form of the *ancient* building, or exceed the usual height, *neither ought he by any new erection to hinder the wind from coming into my barn, which is necessary for the winnowing of my corn,*” &c. [BYLES, J.—Though the Civil Law gave a remedy for the interruption of a prospect, \*277] 58 b.(a)] In Aldred's Case, the stoppage of wholesome air was held to give a right of action; à fortiori, then, will an action lie where the air is used for purposes of trade. The law has always favoured prescriptions for things of necessity and public utility. In Abbott v. Weekly, 1 Levinz 176, a prescription for all the inhabitants of a ville to dance in another man's ground at all times of the year at their free will, for their recreation, was held good,—the Court saying, “This is a good custom, and it is necessary for inhabitants to have their recreation.” So, in Fitch v. Rawling, 2 H. Bl. 393, a custom for “all the inhabitants of a parish to play at all kinds of lawful games, sports, and pastimes in a close of A. at all seasonable times of the year, at their free will and pleasure,” was held good. And see Race v. Ward, 4 Ellis & B. 702 (E. C. L. R. vol. 82), and Bell v. Wardell, Willes 202.

*Couch*, for the defendants.—The distinction between the sort of easement contemplated in the 2d section of the 2 & 3 W. 4, c. 71, and the kind of claim here set up, is pointed out by anticipation by Littledale, J., in Moore v. Rawson, 3 B. & C. 332, 339 (E. C. L. R. vol. 10), 5 D. & R. 234 (E. C. L. R. vol. 16). “There is a material difference,” he says, “between the mode of acquiring a right of way or a right of common, and a right to light and air. The latter is acquired by mere

(a) “For stopping as well of the wholesome air as of light, an action lies, and damages shall be recovered for them, for both are necessary, for it is said *et vescitur aura ætherea*; and the said words ‘*horrida tenebritate*’, &c., are significant, and imply the benefit of the light.” But, “for prospect, which is matter only of delight, and not of necessity, no action lies for stopping thereof, and yet it is a great commendation of a house if it has a long and large prospect, unde *dicitur, laudaturque domus longos qui prospicit agros*. But the law does not give an action for such things of delight.”

occupancy: the former can only be \*acquired by user, accompanied with the consent of the owner of the land; for, a way over [\*278 the lands of another can only be lawfully used, in the first instance, with the consent, express or implied, of the owner. A party using the way without such consent would be a wrongdoer: but, when such a user, without interruption, has continued for twenty years, the consent of the owner is not only implied during that period, but a grant of the easement is presumed to have taken place before the user commenced. The consent of the owner of the land was necessary, however, to make the user of the way (from which the presumption of the grant is to arise) lawful in the first instance. But it is otherwise as to light and air. Every man on his own land has a right to all the light and air which will come to him; and he may erect, even on the extremity of his land, buildings with as many windows as he pleases. In order to make it lawful for him to appropriate to himself the use of the light, he does not require any consent from the owner of the adjoining land. He therefore begins to acquire the right to the enjoyment of the light by mere occupancy. After he has erected his building, the owner of the adjoining land may, within twenty years, build upon his own land, and so obstruct the light which would otherwise pass to the building of his neighbour. But, if the light be suffered to pass without interruption during that period to the building so erected, the law implies from the non-obstruction of the light for that length of time that the owner of the adjoining land has consented that the person who has erected the building upon his land shall continue to enjoy the light without obstruction, so long as he shall continue the specific mode of enjoyment which he had been used to have during that period. It does not, indeed, imply that the consent is given by way of grant; for, *although a \*right* [\*279 *of common* (except as to common appendant), *or a right of way*, *being a privilege of something positive to be done or used in the soil of another man's land, may be the subject of legal grant, yet light and air, not being to be used in the soil of the land of another, are not the subject of actual grant*: but the right to insist upon the non-obstruction and non-interruption of them more properly arises by a covenant which the law would imply not to interrupt the free use of the light and air.”(a) There may be very good reason for supposing that the right was originally acquired by grant, where a man has allowed another for twenty years without interruption to go over his land. But that implication can hardly arise in the case of a windmill. You cannot imply an assent by the owner of the adjoining land to the mill-owner's right to have an uninterrupted flow of wind to his mill, because the former has done nothing to prevent or obstruct it. Wightman, J., in delivering the opinion of the Judges in *Chasemore v. Richards*, 7 House of Lords Cases 349, 370, says: “In such a case as the present,”—where the claim was, for the unimpeded flow of underground water which merely percolated through the earth in no known channels,—“is any right derived from the use of the water of the River Wandle for upwards of twenty years for working the plaintiff's mill? Any such right against another founded

(a) See *Cross v. Lewis*, 2 B. & C. 686, 690 (E. C. L. R. vol. 9), 4 D. & R. 334 (E. C. L. R. vol. 16), where the same learned Judge says: “The case of windows is always different from the exercise of a right of way or of common; for, there, if the thing be done without a right, an actual trespass is committed.”

upon length of enjoyment, is supposed to have originated in some grant which is presumed from the owner of what is sometimes called the servient tenement. But, what grant can be presumed in the case of \*280] percolating waters, depending upon the quantity of \*rain falling or the natural moisture of the soil, and in the absence of any visible means of knowing to what extent, if at all, the enjoyment of the plaintiff's mill would be affected by any water percolating in and out of the defendants' or any other land? *The presumption of a grant only arises where the person against whom it is to be raised might have prevented the exercise of the subject of the presumed grant:* but, how could he prevent or stop the percolation of water?" So, here, it may be asked, how could the defendants have prevented the exercise of the subject of the presumed grant? It was not practicable for them to express their dissent to the plaintiff's acquisition of a supposed right, by actively obstructing it. [BYLES, J.—How does this case differ from the case of the erection of a wall so near the windows of an ancient house as to darken the rooms and render them unwholesome?] Every man has a right to have the air come to him in a wholesome state: to prevent that, is clearly actionable. But the right to light and air are acquired and enjoyed in a definite shape. Lord Wensleydale, in *Chesmore v. Richards*, 7 House of Lords Cases 386, observes: "It is going very far to say that a man must be at the expense of putting up a screen to window lights, to prevent a title being gained by twenty years' enjoyment of light passing through a window. But this case would go very far beyond that. I think that the enjoyment of the right to these natural streams cannot be supported by any length of user, if it does not belong of natural right to the plaintiff." In *Roberts v. Macord*, 1 M. & Rob. 228, it was held by Patteson, J., that the use of an open space of ground in a particular way requiring light and air, for twenty years, does not give a right to preclude the adjoining owner from building on his land so as to obstruct the light and air.

\*281] *\*Keane*, in reply.—The whole reasoning in the judgment of Littledale, J., in *Moore v. Rawson*, is in favour of the plaintiff here. If a man is entitled to wholesome air, why is he not equally entitled to useful air? If the owner of the adjoining land wished to express dissent, he might have done so by either building or planting.

ERLE, C. J.—This case is one of novelty so far as decisions go: but, upon the whole, I am of opinion that the defendants are entitled to succeed. The claim of the plaintiff is to impose upon the defendants' land the servitude of allowing the streams and currents of air and wind to pass over it to the plaintiff's mill, which is about twenty-five yards distant from the defendants' premises. Now, there are three ways in which the owner of the dominant tenement could have acquired a right to such servitude, viz. by prescription, by grant, or by the statute. As the windmill in question was erected within the time of living memory, the plaintiff cannot claim by prescription here; and it is clear that there was no grant under which the plaintiff was to hold his mill and land free from the obstruction complained of. The plaintiff, therefore, can only succeed, if at all, upon the statute 2 & 3 W. 4, c. 71, the 2d section of which enacts that "no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any way or other easement, or to any watercourse or the use of any water, to be enjoyed

or derived upon, over, or from any land or water of our said lord the King, his heirs or successors, &c., or being the property of any ecclesiastical or lay person or body corporate, when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty \*years, shall be defeated or destroyed by showing only [\*282 that such way or other matter was first enjoyed at any time prior to such period of twenty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated," &c. Is this a claim to an easement to be enjoyed or derived upon, over, or from any land, within the meaning of that section? It appears to me that this section was not intended to give a right after twenty years to every sort of enjoyment which may be classed under the general term easement, but that it was meant to apply only to the two descriptions of easement therein specified, viz. the right to a way or watercourse, which may be enjoyed or derived "upon, over, or from any land or water." I do not think the passage of air over the land of another was or could have been contemplated by the legislature when framing that section. They evidently intended it to apply only to the exercise of such rights upon or over the surface of the servient tenement as might be interrupted by the owner if the right were disputed. It is clear to my mind that that was the intention of the legislature, because the section provides that the claim shall not be defeated where there has been actual enjoyment for the period mentioned "without interruption." I am at a loss to conceive what would be an interruption of such a right as is here claimed. In the case of a way, the exercise or enjoyment of the right may be interrupted by the erection of a gate or other impediment. So, of the analogous right to water. So, a claim to lights may be obstructed or interrupted by the erection of a hoarding or other screen by the owner of the servient tenement. But I am utterly unable to see how the access of currents of wind and air to a mill, which is necessarily so constructed as to present its face to whatever quarter the wind may blow from, could \*possibly be interrupted. Suppose [\*283 the same individual to be the owner of all the land round the mill beyond a radius of twenty or twenty-five yards, must he, in order to prevent the acquisition of a right by the owner of the mill, build a wall all round it? I am clearly of opinion that the 2d section of the statute meant to include only such easements upon or over the surface of the servient tenement as are susceptible of interruption by the owner of such servient tenement, so as to prevent the enjoyment on the part of the owner of the dominant tenement from ripening into a right. I am confirmed in this opinion by the 3d section, which enacts, that, "when the access and use of light to and for any dwelling-house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing." The legislature evidently considered the passage of light,—which bears a very close analogy to that of air,—to stand upon a different footing from the other easements with which it had been dealing in the preceding section: and, if it had intended to extend the

right to the uninterrupted passage of wind and air, it would have done so in express terms. For these reasons, I think the plaintiff's claim cannot be sustained under the statute. A strong presumption against the plaintiff's claim arises from the fact that not a single instance can be found of such an action being brought in modern times, and only two in the course of some centuries, and these extremely short and unsatisfactory notes, so that it is impossible to discover from them on what ground \*284] it was that the \*plaintiffs claimed the right of unimpeded access of wind to their mills. It may have been by reason of the owners of them having some manorial rights of suit and service, or by reason of some grant, or by prescription. Here, there is neither grant nor prescription to sustain the claim; nor does it, as I conceive, come within the statute. A grant of such an easement as this would operate as a prohibition to a most formidable extent to the owners of the adjoining lands,—especially in the neighbourhood of a growing town. Every presumption, therefore, militates against the existence of such a right. The easements contemplated by the 2d section of the Prescription Act are such as are capable of interruption, which this is not. So thought Littledale, J., in *Moore v. Rawson*, 3 B. & C. 340 (E. C. L. R. vol. 10), 5 D. & R. 234 (E. C. L. R. vol. 16); and so thought those who took part in the decision of *Chasemore v. Richards*, 7 House of Lords Cases 349. Upon the whole, I am of opinion that the defendant is entitled to our judgment.

WILLES, J.—I am of the same opinion. The claim of the plaintiff in this case cannot be founded upon prescription, because it appears that his mill was only built in the year 1829: and there is no suggestion that there is any grant to sustain it. It must, therefore, if any right exists, be founded upon Lord Tenterden's Act: and, for the reasons given by my Lord, I think that statute is inapplicable. Light stands on peculiar grounds. That which is claimed here amounts to neither more nor less than this,—that a person having a piece of ground, and building a windmill upon it, acquires by twenty years' enjoyment a right to prevent the proprietors of all the surrounding land from building upon it, if by so doing the free access of the wind from any quarter \*285] should be impeded or obstructed. \*It is impossible to see how the adjoining owners could prevent the acquisition of such a right, except by combining together to build a circular wall round the mill within twenty years. It would be absurd to hold that men's rights are to be made dependent on anything so inconvenient and impracticable. The access of light, like the claim of the owner of the surface to the support of the subjacent strata (*Humphries v. Brogden*, 12 Q. B. 739 (E. C. L. R. vol. 64)), is of common right. All that can be said, however, of these cases, is, that, as compared with the general law, they are anomalous. In general, a man cannot establish a right by lapse of time and acquiescence against his neighbour, unless he shows that the party against whom the right is acquired might have brought an action or done some act to put a stop to the claim without an unreasonable waste of labour and expense. With regard to the two cases cited from Winch and Rolle's Abridgment, I would merely observe, that, in the latter, no question appears to have been raised as to the existence of the right, but the only question was whether the owner of the mill was entitled to have a portion of the defendant's house prostrated. And,

as to the other case, it does not appear from the short statement of it how the alleged right was acquired. Besides, in dealing with these cases, one must remember that there was a distinction between ordinary mills and the prescriptive right which the lord of a manor had to compel all the tenants within the manor to grind their corn at his mill. Privileged mills of that description had peculiar rights. The two cases might possibly be explained on some such ground, without introducing an additional anomaly into the law of easements.

BYLES, J.—I also am of opinion that the defendants \*are entitled to judgment. Without expressing any opinion as to whether [\*286 such a right as is here claimed could exist at common law, it is clear that none exists in this case either by grant or by prescription; and that, if the right exists at all, it must repose upon the 2d section of the statute 2 & 3 W. 4, c. 71. To found a right under that statute, the plaintiff must show that it is a claim which might have been made at common law. It is strange, that, among so many instances as must have occurred, no authority is to be found where such a claim as this has been asserted, except the two very loosely reported cases which have been referred to in Winch and in Rolle's Abridgment, from which it is impossible to discover the grounds upon which they proceeded. The right to light has led to difficulty enough. But a claim to have an uninterrupted flow of wind and air to a mill, whose position varies according to the quarter from which the wind blows, would from its extensive nature give rise to infinitely more litigation. If such a right exists as to a mill, it must equally exist as to weather-cocks. I entirely agree with my Lord, that the words "or other easement," in the 2d section of the statute, mean any other easement ejusdem generis with a way,—something that is to be exercised upon or over the soil of the adjoining owner; more especially as it is clear from the next section that they exclude the easement of the access of light. I cannot think that the statute ever intended that a twenty-years' user should be made the foundation of so fanciful a right as this.

*O'Malley.*—The judgment will be for the defendants on the whole record, notwithstanding the finding of the arbitrator of 40s. damages for the plaintiff on the first and third issues.

\*WILLES, J.—The plaintiff cannot recover unless he has judgment upon every issue that goes to the whole cause of action. [\*287

Judgment for the defendants.

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The foregoing case was affirmed on 621. Some observations on the decision to the Court of Exchequer Chamber will be found in 1 Am. L. Reg. ber, see *Webb v. Bird*, 8 Jur. N. S. N. S. 637.

## BELL v. THE MIDLAND RAILWAY COMPANY. *April 23.*

By a particular section of the Act of incorporation of a railway Company, the owners of lands adjoining the line were empowered to lay down or extend either upon their own lands or on lands on the side thereof belonging to the Company, or upon the lands of any other persons, with the consent of such other persons, any collateral or continuous branch from such respective lands, &c., to communicate with the railway for the purpose of bringing carriages upon or across the same.

The plaintiff, in 1839, with the assent of the Company, made a siding on his land connecting the railway with a wharf part of which was in his own occupation and other part in that of certain tenants; and down to the year 1857 the Company carried coals and other goods for the plaintiff and his tenants, placing the trucks on the siding and so sending them down to the wharf. In the course of that year, however, the Company (with a view, as the jury thought, of diverting the trade from the plaintiff's wharf to another wharf in which they were interested) gave the plaintiff notice, under another section of their Act, that, after the 30th of September, they would no longer provide him with locomotive power for the conveyance of his goods along their line: and on the 1st of October they placed carriages and other things across the junction, for the purpose (as the jury found) of permanently obstructing and preventing the plaintiff and his tenants having access to the wharf by means of their railway.

Neither the plaintiff nor his tenants had availed themselves at this time of the authority given to them by the Act of Parliament to provide locomotive power of their own, and consequently they were not in a position to be *actually* obstructed. The tenants, however, finding their trade destroyed, removed from the plaintiff's wharf, and carried their business to the Company's wharf:—

Held, that these wrongful Acts of the Company constituted such a permanent obstruction and injury to the plaintiff's right to the use of his siding as to entitle him as reversioner to maintain an action.

For the portions of the wharf occupied by his two tenants, the plaintiff was to be paid a certain royalty on all coals sold,—the minimum royalty to be paid by one being 200*l.* per annum, and by the other 180*l.*: and the plaintiff was at the time of the obstruction complained of in treaty with a third person for letting him the remaining portion of the wharf at 300*l.* per annum:—Held, that the jury were warranted in taking these sums into their consideration in estimating the amount of damage the plaintiff had sustained.

Held, also, per Willes, J., and Byles, J.,—that the case was one in which the jury were justified in giving exemplary damages.

THIS was action against the Midland Railway Company to recover damages for an alleged wrongful obstruction of the communication between their railway and an adjoining wharf and branch railway of the plaintiff.

\*288] The declaration stated, that, after the passing of the \*Act for making the Midland Counties Railway (6 & 7 W. 4, c. lxxviii.), and before the passing of the Act of Parliament next therein-after mentioned, the Midland Counties Railway was made by a Company who were by the said Act incorporated under the name and style of the Midland Counties Railway Company, and the plaintiff being, as thenceforth until and after the thereafter causes of action he had continued to be, the owner and occupier of lands adjoining or near to the said railway, made a wharf on his said lands at his own expense, and laid down, extended, and until and after the thereafter mentioned acts and grievances complained of kept and maintained on his own lands and lands at the side thereof belonging to the said Company, a collateral or continuous branch railway from the said wharf on a level with the defendants' said railway, and on his the plaintiff's own lands and on lands at the side thereof belonging to the said Midland Counties Railway Company, to communicate with the said Midland Counties Railway; which said branch was so made in pursuance of the said

Act for the purpose of bringing carriages upon the same, and to form, and did continually until the thereafter acts and grievances complained of form, a junction with the said Midland Counties Railway, for the purpose of conveying or carrying coal and other products from and by the said railway into and along the said branch to the said wharf: That the said Midland Counties Railway Company, for the purpose aforesaid, at the request of the plaintiff, made a proper and convenient opening and approaches thereto in their said railway, necessary for effecting, and thereby did effect, the said communication and junction, and made the said opening and communication at such place as was, so far as practicable, most convenient to all the parties interested, and as might least interfere with the passage [\*289  
 \*along the said railway, and so as not to endanger the safety of persons using or travelling upon the said railway; which opening and communication from thenceforth until the thereafter said causes of action existed, and during all that time the said railway and branch was used by the plaintiff and his tenants for the purposes aforesaid, and the profits and advantages of and from the said wharf to the plaintiff and his tenants thereof arose from a large business there established of receiving, landing, wharfing, and keeping and selling there coals and other goods sent from or from a point near to a colliery on or near to the said railway, along the said railway, and thence along the said branch to the said wharf: That, before the causes of action thereafter mentioned, and in the seventh year of our Lady the now Queen, an Act of Parliament to consolidate the North Midland Counties and Birmingham and Derby Junction Railways was passed and put into execution (7 & 8 Vict. c. xviii.), and thereby the said Midland Counties Railway Company was dissolved and was united with other Companies, and amalgamated with and into The Midland Railway Company therein mentioned, and which Company the defendants are: That afterwards, and whilst the said branch, junction, and communication and the defendant's said railway were being used by the plaintiff and others his tenants or occupiers claiming under him of the said wharf for the purposes aforesaid, and while the plaintiff was owner and seised in his demesne as of fee of his said lands and wharf, and the said wharf and lands as to part thereof were in his possession, and as to the rest thereof were in the occupation of tenants from year to year of the plaintiff or their sub-lessees, the reversion immediately expectant on the said terms from year to year then and still belonging to the plaintiff, the defendants, by placing \*and keeping placed and driving in and into and upon [\*290  
 the ground above, at, and near the said opening or communication, and in and into the soil of the said branch railway, poles, posts, wooden balks, railway carriages, wagons, trucks, heavy chattels, and other obstructions, *obstructed, stopped up, and closed the said communication and opening, and prevented and kept prevented the plaintiff and the said occupiers of the said wharf from using the said branch for the purposes aforesaid*, whereby the traffic of the said wharf, and the profits to the plaintiff by way of royalty on coals wharfed there, and otherwise, had been destroyed and diminished; and by means of the defendants' said wrongful act and breaches of duty, and during the same, the business of the said wharf was permanently and irrevocably transferred to a wharf of the defendants, and the tenants of the plaintiff of the said

wharf at high rents had lawfully determined their tenancies, as they would not but for the said wrongful conduct of the defendants have done; and the expenses to the plaintiff of making the said wharf, of laying down the said branch, and providing the same with proper means and appliances for the use of the same, had been wholly lost to the plaintiff, and rendered unprofitable; and the plaintiff's reversion in the said wharf and land had been greatly prejudiced and diminished in value: Claim 5000*l*.

The defendants pleaded,—first, not guilty,—secondly, as to so much of the declaration as charged an injury to the plaintiff in respect of the alleged possession of part of the said wharf and lands, and in respect of the branch, junction, and communication, and the defendants' railway being used by the plaintiff, that the plaintiff was not possessed of the said part, nor was he using the said branch, junction, communication, and railway, as alleged. Issue.

\*291] \*The cause was tried before Erle, C. J., at the sittings in London after last Michaelmas Term, when the following facts appeared in evidence:—The defendant was the owner of a considerable portion of land at Leicester through which the defendants' railway passed; and, when the railway was formed, in the year 1839, he constructed a wharf adjoining it, and after some negotiation with the Company, he, on the 14th of August in that year, obtained permission to make a siding from the railway to the wharf adjoining the Leicester station. The resolution for that purpose was confirmed at a subsequent meeting of the Company on the 5th of December. The wharf and siding were used by the plaintiff and his tenants, without interruption, from that time till the month of October, 1857, for the purpose of receiving from the railway coals and other goods consigned to the wharf,—the trucks containing them being brought by the Company's engines to the mouth of the siding, and thence propelled onwards by them to the wharf.

In 1857, the Company constructed another wharf by the side of the railway, a considerable portion of which was taken by their chairman, who carried on the business of a coal merchant: and, with a view to the diversion of the trade from the plaintiff's wharf to their own, they by a notice of the 16th of June in that year, intimated to the plaintiff that from and after the 30th of September then next they would cease to provide locomotive power for the conveyance of wagons to and from the plaintiff's wharf. A remonstrance from the plaintiff drew from the secretary of the Company the following reply:—

“Midland Railway, Secretary's Office, Derby,

“August 19th, 1857.

\*292] “Dear Sir,—I am instructed to inform you that the directors have this day had your letter of the 30th \*ult. under their consideration, and to call your attention to the fact that it was not until the 16th day of June last that they were made aware of your claim to a right of passage to the wharf in Campbell Street, Leicester, from the main line of the railway. The directors adhere to their resolution conveyed to you in my letter of the 16th of June last, and decline to enter upon a reference of the matters proposed in your letter; and I am further instructed to inform you that they will contest your right to the

privileges claimed by you, in the event of their being asserted before any tribunal.

"G. N. BROWNE, Secretary."

"J. F. BELL, Esq."

In pursuance of this notice, on the 1st of October, 1857, when certain wagons laden with coals for the plaintiff's wharf arrived at the siding, instead of detaching them from the rest of the train and sending them down the siding as before, the defendants caused them to be carried to a siding or junction leading to their own wharf, altogether inaccessible to the plaintiff, and there left them.

Circulars were sent to the plaintiff's tenants informing them that the Company had ceased to deliver coals at the plaintiff's wharf, and intimating to them that they would find ample accommodation allotted to them at the Company's wharf: and, in the course of a conversation which the plaintiff had upon the subject with the chairman of the Company, that gentleman said: "That wharf shall never be a wharf again if I can help it." Instructions were also given to the traffic-manager at the Leicester station not to keep the junction leading to the plaintiff's wharf clear, but to keep it blocked up by placing carriages across it. And in December, 1857, the defendants caused some wooden balks to be driven into the ground, and a stage to be erected across the line [\*293 of rails between the plaintiff's wharf and the railway, so as completely to obstruct and block up the siding. This obstruction continued until the plaintiff applied for and obtained an injunction.

On the 1st of October, 1857, a person named Nutt, who was tenant of part of the plaintiff's wharf, went with horses to convey the wagons from the place where the Company's servants had left them to the siding and so on to the wharf; but he was told by the traffic-manager that he had orders to prevent him from going on the line for that purpose.

In consequence of the course of conduct pursued by the defendants, the plaintiff's wharf became useless, and his tenants quitted.

In order to show the damage he had sustained, the plaintiff proved that a portion of the wharf was held by himself; that another portion was let to Nutt, as tenant from year to year, at a minimum rent of 200*l.* a year, with a royalty on all coals sold; that another portion was in like manner let to one Gould at a minimum rent of 180*l.* a year; and that he had had an offer of 300*l.* per annum from one Harris for the portion of the wharf which remained in his own hands, but the negotiation went off in consequence of the impediments thrown in the plaintiff's way by the defendants.

Nutt eventually quitted the plaintiff's wharf, and became tenant to the defendants. And since the obstruction complained of the plaintiff had sold his wharf.

At the close of the plaintiff's case, it was objected on the part of the defendants, that, inasmuch as the plaintiff was not on the 1st of October, 1857, in a position to exercise the right conferred upon him by [\*294 the statute, (a) the Company could not have been guilty of any

(a) The 200th section of the 6 & 7 W. 4, c. lxxviii., enacts that "no locomotive or other engine or other description of motive power shall at any time be brought or be upon or be used on the said railway (except the locomotive engines or other engines or motive power belonging

obstruction of which he could complain; that, at all events, the plaintiff could not claim damages for the loss of Nutt's rent; and that, so long \*295] as Nutt continued tenant, all the damages the plaintiff \*could sustain by the alleged obstruction would be the loss of the royalty upon the coals which might have been sold by Nutt if there had been no such obstruction.

The Lord Chief Justice, in leaving the case to the jury, asked them to say whether the defendants did by an intentional obstruction stop up the communication between their railway and the plaintiff's wharf, and prevent him and his tenants from using the same,—warning them particularly not to give the plaintiff any damages which Nutt would have a right to recover, but to confine them to the loss of royalties and any diminution in the saleable value of the wharf which might have resulted from the defendants' wrongful acts.

The jury found that the defendants had intentionally obstructed the access to the plaintiff's wharf, and returned a verdict for him with 1000*l.* damages.

*Sir Fitzroy Kelly*, Q. C., in Hilary Term last, pursuant to leave reserved to him at the trial, obtained a rule nisi to enter a verdict for the defendants, or a nonsuit, on the grounds,—“first, that there was no evidence to go to the jury of the obstruction alleged,—secondly, that \*296] there was no evidence that the \*plaintiff or his tenants had ever complied with the conditions prescribed by the Railway Act, or ever was in a condition to exercise the right of running carriages or engines along his branch railway on, to, and from the Midland Railway, wherefore the acts of the defendants as alleged or proved did not in point of law amount to an obstruction of the plaintiff's right,—thirdly, that there was no proof of any permanent obstruction by authority of the defendants which entitled the plaintiff to maintain the action;” or for a new trial “on the ground that the plaintiff, as reversioner, was not entitled

to or found and provided by the said Company, or by such person as may be from time to time especially licensed in that behalf by the said Company, or which shall belong to or be provided by any other railway Company acting by virtue of any Act of Parliament, whose road shall communicate with the said railway, and which shall usually travel on the road of such other railway Company), *unless the same shall first have been approved of by the said Company*; and it shall be lawful for the said Company, and they are hereby required, *within twenty-one days after notice given to them by any person desirous of bringing any such engine on the said railway, to cause their engineer or other agent by them appointed in that behalf, to inspect and examine such engine at any place within five miles of the said railway, and report thereon to the said Company*; and such engineer or other agent shall and they are hereby required, *within ten days after such report, to give to the party requiring the same a certificate stating whether such engine is or is not fit and proper to be used on the said railway, and whether he approves or disapproves of the same*; and it shall be lawful for the said Company from time to time, upon the report of their engineer or other agent in that behalf appointed, of any engine used upon the said railway being out of repair or unfit to be used upon the said railway, to order the same to be taken off, or to forbid the same to be used upon the said railway; and in case any person shall bring or use upon the said railway or any part thereof any locomotive or other engine without having first obtained such certificate of approval by the Company's engineer as aforesaid, or in case, after notice given by the said Company, their engineer or agent, to remove from or not to use upon the said railway, or any part thereof, any engine disapproved of as aforesaid, and the person to whom such engine shall belong shall not forthwith remove the same, or shall use any such engine upon the said railway or any part thereof without having first repaired the same to the satisfaction of the said Company, and obtained such certificate of approval in writing by the Company's engineer or agent as aforesaid, every such person shall forfeit and pay any sum not exceeding 20*l.* for every such offence; and the said Company are hereby authorized to remove any such engine from the said railway, doing as little damage to such engine as conveniently may be.”

to any damages for any injury to the tenants, or unless upon some permanent obstruction necessarily injurious to him as reversioner, and that he was not entitled to any damages in respect of Gould's premises, or the premises about to be let to Harris."

*Lush, Q. C., and Merewether*, now showed cause.—The Company's Act of incorporation contains the usual powers for adjoining owners to make sidings and communications with the railway: (a) and that which

(a) The 75th section of the Company's Act of incorporation, 6 & 7 W. 4, c. lxxviii., enacts "that it shall be lawful for the owners or occupiers of any lands, mines, or minerals adjoining or near to the said railway, or of any lands, mines, or minerals the product whereof such owners or occupiers may desire to carry to or across the said railway, and for any person entitled or hereafter to be entitled to the use of any private railway made or hereafter to be made, for or which he may be desirous of adapting to the purposes aforesaid, and for any other person whomsoever, at his own expense (except as hereinafter mentioned in respect to the bridges, viaducts, tunnels, or archways), to lay down or extend either upon his own lands or on lands on the sides thereof belonging to the said Company, or upon the lands of any other persons with the consent of such other persons, any collateral or continuous branch from such respective lands, mines, minerals, or private railway, to communicate with such Midland Counties Railway, for the purpose of bringing carriages upon or across the same, and in all cases where any existing private railway, being on the same level with the said Midland Counties Railway, now crosses or intersects the line of the said last-mentioned railway, the persons entitled to the use of such private railway shall be entitled and may require to have proper and convenient openings at or as near as may be to the present proposed point of intersection in the rails, ledges, or flanches of the said Midland Counties Railway, made and continued by and at the expense of the said Company; and, as to private railways hereafter to be made, whether on the same level with the said Midland Counties Railway or otherwise, such openings, and also all bridges, viaducts, tunnels, and archways, and the approaches thereto, which may be necessary for conveniently crossing the said Midland Counties Railway, may be required by the person entitled to the use of such private railway to be made, with proper and convenient approaches, at the joint and equal expense of the said Company and the person requiring the same, so as to enable all persons entitled to use such respective private railways to cross and communicate with the said Midland Counties Railway; and it shall be lawful for the said persons entitled to the use of such respective private railways to cross the said Midland Counties Railway, and thence to proceed along any continuation of such private railway, or to form a junction with the said Midland Counties Railway, for the purpose of conveying and carrying, and to convey and carry, on, to, from, across, or along the same, or any part thereof, the coal, minerals, or other products brought along any of the said respective private railways, and in like manner to convey and carry any such coal, minerals, or other products from the said Midland Counties Railway into and along such respective private railways; but all the openings and communications, bridges, viaducts, tunnels, and archways so to be made into, over, or under the said Midland Counties Railway for the purposes aforesaid, shall be so made at such places as may, so far as shall be practicable, be most convenient to all the parties interested, and as may least interfere with the passage along the said railway, and so as not to endanger the safety of persons using or travelling upon the said railway; and the said Company shall not receive any rate or toll or sum for the passing of any goods or other things along such branch so existing or to be made by any such owner or occupier or person as aforesaid, nor for crossing such railway: Provided always that the said Company shall not be bound to make any such opening in any places where they shall have erected, built, made, or set up any building, steam-engine, works, machinery, station, or yard, or in any place which they shall have appropriated or set apart for any specific purpose with which such communication would interfere, nor upon any inclined plane, nor in any tunnel; and, in case any disagreement or difference shall arise between any such owners and occupiers or other persons and the said Company as to the proper places for making any such opening as aforesaid, then the same shall be left to the decision of any two justices of the peace acting within their jurisdiction, whose determination, and after the examination of such competent witnesses as may be produced before them, shall be binding; and such justices are hereby authorized and required to take cognisance of all such references, and to act therein accordingly: Provided also that the persons making or using such branch railways to communicate with the said main railway, shall be subject to all such by-laws with respect to traffic upon the said main railway as shall be from time to time made by the said Company or the directors thereof."

The 7 & 8 Vict. c. xviii., s. 1, contains the following proviso:—"Provided, nevertheless, that the repealing of the said Acts shall not annul or in any wise prejudice or affect any purchase,

\*297] is \*complained of here, is, the obstruction of the plaintiff's enjoyment of the siding so made. It is now said that the plaintiff was not obstructed in the exercise of his right, because he was not in a position to carry coals along the defendants' railway. There was, however, \*298] \*abundant evidence of obstruction. [ERLE, C. J.—The jury found that the defendants did prevent the plaintiff's access to the wharf, by intentionally placing an obstruction across the siding. *Sir F. Kelly*.—That which the plaintiff calls an obstruction is no more \*299] \*than a mere cesser, on notice, to carry coals for him along their line. He never gave the Company notice of his intention to provide engines, or called upon them to inspect and approve thereof; consequently he never was in a condition to be obstructed in the enjoyment of any right which he was entitled to \*exercise.] That \*800] never was matter of controversy between the parties: the whole course of conduct by the Company was a distinct repudiation of his right to use the railway at all. Then, as to the damages, the plaintiff was clearly entitled to be compensated for the loss of royalties which he would but for the unlawful acts of the Company have received from Natt and from Gould, and for the loss he sustained through the negotiation with Harris going off, and also for the diminished value of his wharf in consequence of its trade having been destroyed. And for these the damages found by the jury are not excessive.

*Sir Fitzroy Kelly, Q. C., Mellor, Q. C., and Phipson*, in support of the rule.—The plaintiff had no right to call upon the Company to carry coals for him along their line by means of their own locomotive power and wagons to the siding, or to carry back the empty trucks from the siding to the colliery; nor had he any right to call upon them to stop their trains at the siding for the purpose of delivering coals at his wharf. The only right the plaintiff had, was, to use the railway with the siding for the conveyance of his own wagons by means of his own locomotive power, on payment of proper tolls, and subject to arrangement with the Company. If they refused to allow him so to use their line, they would render themselves liable either to an action at law or to proceedings in equity. The language of the 75th section of the 6 & 7 W. 4, c. lxxviii.

sale, conveyance, grant, contract, security, act, matter, or thing whatsoever heretofore made, done, committed, or instituted under or by virtue or in pursuance of the said repealed Acts, or any of them; but all such purchases, sales, conveyances, grants, contracts, securities, acts, matters, and things shall be and the same are hereby declared to be as good, valid, and effectual, to all intents and purposes whatsoever, as if the said Acts were not repealed: Provided also, that nothing herein contained shall extend in any way to defeat, affect, or prejudice any rights, privileges, liberties, powers, easements, accommodations, or exemptions which under or by virtue of the said recited Acts, or any of them, are given, granted, continued, or reserved to or for the benefit of any persons or corporations whose estates, properties, or interests are, have been, or may be in any wise affected in or by the making or maintaining or otherwise on account of the railways, branches, and works by the same Acts respectively authorized to be made and maintained, &c.: Provided also, that nothing herein contained shall extend to affect or prejudice in any respect the rights of owners and occupiers of lands, mines, and minerals, and other works, in and to any private branch railways or other communications with the said railway or any of them, whether made in pursuance of the powers and provisions contained in the said several recited Acts or any of them, or with the consent of owners and occupiers of lands; but that such several owners and occupiers of lands, mines, and minerals shall have, use, and enjoy the same rights and privileges in respect of such private branch railways and communications as immediately before the passing of this Act they were respectively entitled to have, use, and enjoy under or by virtue of the said recited Acts or any of them, and as fully and effectually in all respects as if the same had not been hereby repealed."

(ante, 296, n.) is express. And this is not a point first started upon the plaintiff at the trial: he had due notice of it by the secretary's letter of the 16th of June, 1857. The whole of the evidence negatives the allegation in the declaration. The Company could not be guilty of an obstruction of the plaintiff's right, until he had placed himself in a position to \*exercise some right. The hasty and ill-advised expression of the chairman is not to prejudice the rights of the share- [\*301 holders. [WILLES, J.—It must be borne in mind that the Company in the proceedings before Vice-Chancellor Wood, and again before the Lords Justices, denied the plaintiff's right to have the siding.] They denied the plaintiff's right to insist upon their carrying coals for him. The damages are clearly assessed upon an erroneous principle. There is nothing in the declaration, or in the evidence, which could have been attended with damage to the plaintiff, except the refusal on one occasion to detach a few trucks from the train at the plaintiff's siding; and that was a damage to the tenant Nutt, and not to the plaintiff. There is no pretence for saying that the plaintiff has been deprived of any rent or royalties by any act of the defendants. Nutt and Gould held as tenants from year to year, and could only determine their tenancies by a regular notice to quit. There was nothing to show that the plaintiff could not now recover his rent. As to each of these, the jury have given fourteen months' rents and royalties. There was no evidence that Gould had a single ton of coals to send by the railway; there could therefore be no obstruction to any right of his. As little pretence is there for the 540*l.* awarded for the loss of the bargain with Harris.(a) To entitle a reversioner to maintain an action for a nuisance or obstruction to his tenants, the thing done must be of a permanent character: *Baxter v. Taylor*, 4 B. & Ad. 72 (E. C. L. R. vol. 22), 1 N. & M. 11 (E. C. L. R. vol. 28); *Mumford v. The Oxford, Worcester, and Wolverhampton Railway Company*, 1 Hurlst. & N. 34;† *Simpson v. \*Savage*, 1 C. B. N. S. 347 (E. C. L. R. vol. 87). Here, the carriages are movable. [\*302 [WILLES, J.—A fire will go out if it be not fed with fuel; but the carriages will not roll themselves away. But for the interference of the Court of Chancery here, the obstruction would have been permanent enough.] It is submitted that the action is altogether misconceived.

ERLE, C. J.—I think this rule should be discharged. The action is brought by Mr. Bell, the proprietor of a wharf adjoining the defendants' railway, who clearly was entitled under the Company's Act of Parliament to a right of passage from their railway to his siding. The cause of action is, that that right was obstructed. The alleged obstruction began on the 1st of October, 1857, and consisted of the placing carriages on the line of rails opposite to and across the communication with his wharf. These carriages of course were movable, but they were permanently kept there for a long time, and for at least ten days constituted what may be called a permanent obstruction: and it was calculated and intended by the Company to be permanent, and to entirely destroy the communication, and was only removed upon the interference of the Court of Chancery. The Company denied the plaintiff's right to have access to his wharf by means of the railway, and the acts of the Com-

(a) It was assumed that the damages were made up thus,—320*l.* for loss of fourteen months' rent and royalties which would have been received from Nutt, 140*l.* for the like from Gould, and 540*l.* for the loss of Harris's bargain.

pany were intended to prevent him from exercising that right. The language of Mr. Ellis, the chairman, was also evidence to show that it was intended to be a permanent obstruction. The conduct of the traffic-manager, who was acting under instructions from the Company, showed the same intention, and that he had orders to prevent the communication. The way in which the remonstrance of the plaintiff's attorney was met leads to the same conclusion. There was abundant evidence \*303] that the Company intended to \*prevent the plaintiff from using the communication between their railway and his wharf: and the jury upon this evidence have found, and rightly found, that the obstruction was intentional. The great argument for the defendants upon this part of the case, was, that the plaintiff was not in a position to be obstructed, inasmuch as he did not present himself to claim the right he was by the Act of Parliament entitled to exercise. But, after the intimation which the plaintiff and his tenant Nutt had received, it would have been an entirely nugatory act to come with wagons and ask to be allowed to pass on to the siding. They had been told by the Company's servants that they would not be permitted to pass. Was that a cause of action to a person situated like this plaintiff, having a valuable wharf, part of which was let to two separate tenants, and other part in his own hands, and yielding him a large profit if unobstructed? It is contended that the action will not lie, partly because the obstruction was not of a sufficiently permanent character, and partly because the wharf was in the possession of tenants. The letting, however, was subject to a royalty; and, though a minimum royalty was stipulated for in each case, still the plaintiff had an interest in the increase of the royalty. As far, therefore, as the tenants Nutt and Gould were concerned, the plaintiff had a present interest; and, as far as concerned the rest of the wharf, the plaintiff would but for the wrongful act of the defendants, have derived a further interest to the extent of 300*l.* per annum from it. Consequently, as to both, the plaintiff sustained a direct and immediate injury, for which he was entitled to maintain an action. The action was not founded upon the Company's omission to stop their trains or to supply engine-power for the plaintiff's accommodation. The plaintiff \*304] wished the Company to deal with him as with \*other persons: but, failing that, he consulted his legal advisers, and was advised by them that he had a remedy at law against the Company for the wrongful obstruction; and he has proved that wrong to the satisfaction of the jury. Then it is said that the damages were too large; and that Nutt and Gould, being tenants from year to year, were bound to pay their rent to the plaintiff, and so he sustained no loss in that respect. Nothing of that sort was proved at the trial. All that appeared was, that, finding they could get no coals brought to the wharf, the tenants quitted. And, looking at the conduct of the Company, who set up a wharf of their own, and, careless whether they were doing right or wrong, prevented all access to the plaintiff's wharf, for the purpose of extinguishing his trade and advancing their own profit, it is impossible to say the plaintiff was not entitled to ample compensation. To say that, under these circumstances, 1000*l.* was not very temperate damages, seems to me to be a very bold proposition on the part of the Company.

WILLES, J.—I am of the same opinion. The substance of the case

is this:—The plaintiff, under the 75th section of the Company's Act(a) and the 76th section of the Railways Clauses Consolidation Act, 8 & 9 Vict. c. 20, had the benefit of a siding communicating with the defendants' railway adjoining a wharf, a portion of which he had let out to tenants, and for other portion of which he was desirous of getting a tenant, at a rent which would necessarily be much enhanced by the convenience of the siding. He had as much right to the use of that siding for the convenience of his wharf as the railway company themselves had to the use of any portion of their \*railway. If the parties had stood [\*305 upon their strict rights at the outset, the plaintiff's strict right would have been to have the use of the railway by means of his own engine and wagons, subject to the approval of the Company in the way pointed out by the 200th section of the Company's Act.(b) By arrangement, however, the Company did that which was found to be the most convenient; they supplied the locomotive power themselves, and brought the coals to the junction, and thence on to the siding of the plaintiff. This was the course of dealing down to the time of the quarrel between the parties in 1857. The cesser arose, not from any default on the part of the plaintiff or his tenants, but from this,—The Company, having constructed a wharf of their own, were desirous of withdrawing the business from the plaintiff's wharf and diverting it to their own. That object they attempted to carry into effect in three ways,—first, by ceasing to give the impulse to the plaintiff's wagons so as to send them on to the siding,—secondly, by discontinuing the practice of stopping the wagons at the junction,—thirdly (and on this the whole question at the trial appeared to depend), by placing an obstruction on the siding, so as to block up the mouth, which obstruction was to remain and did remain there permanently: and this they did for the avowed purpose and with the avowed intention of preventing the plaintiff and his tenants from using the siding at all. It has been said that the Company are not bound by what the chairman said. That may be. But I have looked at the reports of the proceedings before Vice-Chancellor Wood in November, 1858, and before the Lords Justices on appeal in February, 1859,(c) and I find that on both occasions the Company strenuously contended that the \*plaintiff had no right to have the siding con- [\*306 tinued against their will, and that they were justified in causing the obstruction. Having read that, I must confess I felt not a little astonishment that the Company should have instructed their counsel to deny that they ever had any intention to obstruct or to contest the plaintiff's right. That is an entire misrepresentation: the Company did, in respect of that third matter, all they could to obstruct the plaintiff, and to prevent him from using the siding. Here, then, we have a private right analogous to a right of way, and an obstruction placed thereon avowedly for the purpose of preventing the exercise of that right. It is said that no action will lie for that obstruction at the suit of the reversioner, first, because he was not in a condition to exercise his right until he had an engine on the line approved by the Company's engineer, and secondly, because he had sustained no injury, inasmuch as he did not tender any wagons to be passed on to the siding. That

(a) Ant<sup>2</sup>, p. 296.

(b) Ant<sup>2</sup>, p. 294.

(c) See *Bell v. The Midland Railway Company*, 3 De Gex & J. 673.

seems to be blowing hot and cold. The answer, however, is, that the law does not drive people to do that which is idle and vain,—*Lex neminem cogit ad vana seu inutilia peragenda*. It would have been useless and an idle expense for the plaintiff to have provided himself with locomotive power, when the Company were contesting his right to have any siding. This is not like a public right, which must be asserted before it can be obstructed. It is a private right, which confessedly exists; and for the obstruction of it an action may be maintained without showing an actual injury sustained. Next, it is said that the plaintiff cannot maintain this action, because he has only a reversionary right. But, as to a portion of the premises, at least, he was not a reversioner: it was in his hands unlet. Besides, there is this further answer, viz., that it is not necessary that there should be a permanent obstruction of \*307] the right \*of way, in order to give the reversioner a right of action: it is enough if the act is calculated to abridge or interfere with the estate of the reversioner. In *Kidgill v. Moore*, 9 C. B. 364 (E. C. L. R. vol. 67), locking a gate across a way, was held to be a sufficient obstruction to give the reversioner a right of action. It is enough if for all substantial purposes the obstruction is of a permanent character. Here, there was abundant evidence for the jury that the obstruction was permanent. It has been further said that it is no ground of action that the act done has deprived the plaintiff of tenants. I will in answer to that only refer to Comyns's Digest, *Action upon the Case for Disturbance* (A. 6), where it is said that an action will lie at the suit of the lord, if "his tenants are impoverished by distresses to come to another Court;" and to Comyns's Digest, *Action upon the Case for Misfeasance* (A. 6), where it is said that an action will lie if a man "threaten the tenants of another, whereby they depart from their tenures," or "If he threaten the workmen and customers that come to his stone-pit, whereby he loses the profit of it." There remains now only one question, viz., as to the amount of damages. I must say that, if ever there was a case in which the jury were warranted in awarding damages of an exemplary character, this is that case. The defendants have committed a grievous wrong with a high hand, and in plain violation of an Act of Parliament; and persisted in it for the purpose of destroying the plaintiff's business and securing gain to themselves. If it were necessary to cite any authority for such a position, it will be found in the case of *Emblen v. Myers*, 6 Hurlst. & N. 54,† which I cite only for illustration.

BYLES, J.—I am of the same opinion. As to the points reserved, I \*308] entirely agree with what has fallen \*from my Lord and my Brother Willes, and I have nothing to add. With regard to the damages, I do not understand that there is any complaint as to the way in which that part of the case was left to the jury. If the plaintiff had been a mere reversioner, receiving a pecuniary rent in the ordinary way, I should have desired time to consider. But it appeared that he was himself in occupation of part of the wharf, and that he received a royalty on the rest. He therefore sustained not merely a postponed injury, but a present pecuniary damage, which takes this case out of the authorities relied on by Mr. Phipson. I agree also with my Brother Willes, that, where a wrongful act is accompanied by words of contumely and abuse, the jury are warranted in taking that into their consideration, and

giving retributory damages. For these reasons, I concur in thinking that there is no ground for disturbing the verdict.

Rule discharged.

**JAMES COPLESTON TOWNSEND, Appellant; WILLIAM READ, Respondent. May 11.**

A refusal by justices to make an order for the disallowance of a particular item in the accounts of a surveyor of highways, is ground for an appeal under the 20 & 21 Vict. c. 43.

The 111th section of the General Highway Act (5 & 6 W. 4, c. 50) enacts, that, if the inhabitants of any parish shall agree at a vestry to defend any indictment found against any such parish, or to appeal against any order made by or proceeding of any justice in the execution of any of the powers given by the Act, or to defend any appeal, it shall be lawful for the surveyor of such parish to charge in his account the reasonable expenses incurred in defending such prosecution, or prosecuting or defending such appeal, after the same shall have been agreed to by such inhabitants at a vestry or public meeting as aforesaid and allowed by two justices; which expenses, when so agreed to or allowed, shall be paid by such parish, &c.:—Held,—regard being had to the provision in the former Act, 13 G. 3, c. 78, s. 66,—that “and” in s. 111 of the 5 & 6 W. 4, c. 50, is to be read “or,” and consequently that the surveyor was entitled to charge such expenses after they had either been agreed to at a vestry or allowed by two justices.

*Quere*, whether the allowance of the surveyor's accounts by the justices in special sessions under the 44th section of the 5 & 6 W. 4, c. 50, is a sufficient allowance by two justices within the meaning of s. 111?

THIS was a case stated by justices for the opinion of this Court, pursuant to the statute 20 & 21 Vict. c. 43.

The respondent had been for many years past appointed, under the 5 & 6 W. 4, c. 50, as a salaried surveyor of highways for the parish of Swindon, in the county of Wilts. On the 25th of March, 1859, the respondent was by the inhabitants of the said parish again elected, and he was duly appointed as such surveyor.

\*On the 29th of March, 1860, the respondent, as such surveyor, made up and signed his accounts for the past year, and laid them before the parashioners in vestry assembled; and afterwards, on the same day, it being a special sessions for the purposes of the highways for the petty-sessions division of Swindon, in which the said parish of Swindon is situate, the respondent laid the same accounts before two justices, and thereat, at the time of the verification of such accounts, the appellant, being a person chargeable to the highway-rate of the said parish, made his complaint to the justices against the surveyor, and they heard such complaint, and examined the respondent on oath.

The appellant objected to sundry items in the respondent's account, and amongst them were the sums of 15*l.* and 105*l.* 12*s.* 2*d.* The justices, acting under the 5 & 6 W. 4, c. 50, s. 44, heard the complaint of the appellant, and examined the respondent on oath: and upon such examination they disallowed the 15*l.*, but, as regarded the 105*l.* 12*s.* 2*d.*, it appeared to have been incurred by the respondent as such surveyor in law proceedings under the sanction of the inhabitants of the parish of Swindon in vestry assembled, and the bill of the solicitor for the respondent by which the said sum of 105*l.* 12*s.* 2*d.* was incurred, was duly taxed by the clerk of the peace of the county of Wilts at that sum.

The appellant contended before the justices, that, under the 5 & 6 W. 4, c. 50, s. 111, the respondent was only entitled to have charged that sum of 105*l.* 12*s.* 2*d.* in his account, after the same should have been agreed to by the inhabitants at a vestry, and allowed by two justices of the peace within the division.

\*310] The justices, having duly considered the whole of \*the circumstances, saw no reason for disallowing that sum; and they made no order respecting it. The accounts were verified and signed; and the justices signed at the foot of such accounts the following verification:—

“Wilts, to wit. The within and foregoing account was verified before A. B. and C. D., Esqs., two of Her Majesty’s justices of the peace for the county of Wilts, at a special sessions for the highways in and for the division of Swindon, at Swindon, in the said county, holden on the 29th of March last, and thence continued by adjournment from time to time until this day: and we the said above-named justices present at the said special sessions, and also the same and majority of justices now present at the adjournment thereof, and complaint having been then and now at the time of such verification made to us by J. C. Townsend, an inhabitant of Swindon, against such account, and having heard such complaint, and examined William Read, the surveyor, on oath, and having taken the whole of such complaint and objections to such account made by the said J. C. Townsend into consideration, do order that the said sum of 15*l.* for law charges of H. Kinneir, a solicitor, as per bill, be disallowed and be struck out of such account, leaving a balance of 107*l.* 13*s.* 2*d.* due to the said surveyor.”

The appellant contended that the justices were wrong in point of law, inasmuch as the said sum of 105*l.* 12*s.* 2*d.* having been objected to by him as an illegal payment made by the respondent out of the highway-rates of the parish, as such surveyor, the justices should, upon the verification of such accounts, have made an order that that specific sum should have been allowed, as the appellant alleged he might have then \*311] claimed a right of appeal against such allowance \*as an order made by justices. Whereupon the appellant asked the opinion of the Court,—

“1. Whether, under the circumstances stated, the sum of 105*l.* 12*s.* 2*d.* ought to have been allowed or disallowed by the justices:

“2. Whether,—if the Court should be of opinion that the said sum of 105*l.* 12*s.* 2*d.* ought to have been allowed,—the aforesaid verification of such surveyor’s account by the justices made was a good and sufficient order and allowance for that purpose.”

*Macnamara*, for the appellant.—The question in this case turns upon the construction to be put upon the 44th and 111th sections of the General Highway Act, 5 & 6 W. 4, c. 50. The 44th section enacts, that, “within fourteen days after the election or appointment of surveyor as therein directed, the accounts as aforesaid made in writing, and signed by the surveyor, district surveyor, or assistant surveyor for the year preceding, of all moneys received and disbursed by virtue of this Act, ending on the day of the election or appointment of surveyor, shall be made up, balanced, and laid before the parishioners in vestry assembled, who may, if they think fit, order an abstract thereof to be printed and published; and within one calendar month after the election or appoint-

ment of surveyor as herein directed, the said accounts shall be signed by the surveyor, district surveyor, or assistant surveyor for the year preceding, and laid before the justices of the peace at a special sessions for the highways holden at the place nearest to the parish or district for which such surveyor shall have been appointed; and such justices are hereby authorized and required to examine him as to the truth of the said accounts or of any charge contained therein: Provided always, that, if any person chargeable to the rate authorized to be \*made by this Act has any complaint against such accounts, or the application of the moneys received by the said surveyor, it shall be lawful for any such inhabitant to make his complaint thereof to such justices at the time of the verification of such accounts as aforesaid, and the said justices are hereby required to hear such complaint, and, if they shall think fit, to examine such surveyor upon oath, and to make such order thereon as to them shall seem meet." And s. 111 enacts, "that, if the inhabitants of any parish shall agree at a vestry to defend any indictment found against any such parish, or to appeal against any order made by or proceeding of any justice of the peace in the execution of the powers given by this Act, or to defend any appeal, it shall and may be lawful for the surveyor of such parish to charge in his account the reasonable expenses incurred in defending such prosecution, or prosecuting or defending such appeal, after the same shall have been agreed to by such inhabitants at a vestry or public meeting as aforesaid, and allowed by two justices of the peace within the division where such highway shall be; which expenses, when so agreed to or allowed, shall be paid by such parish out of the fines, forfeitures, payments, and rates authorized to be collected and raised by virtue of this Act: Provided, nevertheless, that, if the money so collected and raised is not sufficient to defray the expenses of repairing the highways in the said parish, as well as of defending such prosecution, or prosecuting or defending such appeal as aforesaid, the said surveyor is hereby authorized to make, collect, and levy an additional rate in the same manner as the rate by this Act is authorized to be made for the repair of the highway." Upon the true construction of these two sections, read together, the surveyor has no right to charge expenses thus incurred in his account, until \*after the incurring of them has been agreed to by the inhabitants at a vestry and allowed by two justices. [BYLES, J. [\*313 —And then the account is to be examined and allowed by other two justices?] Yes. The case, however, as stated, does not furnish sufficient materials to enable the Court to come to a conclusion, inasmuch as it does not show that the "law proceedings" were incurred within s. 111: consequently, it must be sent back, under the provision contained in the 7th section of the 20 and 21 Vict. c. 43. [WILLIAMS, J.—If upon the argument we find we are without sufficient materials to decide the case, we will send it back for amendment.]

*Phipeon*, contra, took a preliminary objection, viz. that this was not a matter in respect of which the magistrates could state a case under the statute. The 20 & 21 Vict. c. 43, recites that "it is expedient that provision should be made for obtaining the opinion of a superior Court on questions which arise in the exercise of summary jurisdiction by justices of the peace:" and the 2d section enacts, that, "after the hearing and determination by a justice or justices of the peace of any

information or complaint which he or they have power to determine in a summary way, by any law now in force or hereafter to be made, either party to the proceeding before the said justice or justices, may, if dissatisfied with the said determination as being erroneous in point of law, apply in writing within three days after the same to the said justice or justices to state and sign a case setting forth the facts and the grounds of such determination, for the opinion thereon of one of the superior Courts of law," &c. This was not a complaint which the justices had power to decide in a summary way, within the Act. The Act \*314] was meant to apply to cases where the justices, in the \*exercise of their ordinary common law jurisdiction, have power to hear and determine, and not to a case like this, of a special reference as to the allowance of the surveyor's accounts, which is purely matter of discretion. The 105th section of the Highway Act gives to any person aggrieved by any rate made under the Act, or by any order, conviction, judgment, or determination, or by any matter or thing done by the justices in pursuance of the Act, an appeal to the Quarter Sessions. In *The Queen v. The Justices of Leicestershire*, 8 Ellis & B. 557 (E. C. L. R. vol. 92), it was held that no appeal lies on the part of the surveyor of highways against an order of justices at highway sessions, allowing part of his accounts, and disallowing the rest, and ordering him to pay over to his successor the amount disallowed. It had already been decided, in *The Queen v. The Justices of the West Riding of Yorkshire*, 1 Q. B. 624 (E. C. L. R. vol. 41), 1 Gale & D. 198, that the decision of the highway sessions was final where it was against the parishioners who had objected to the accounts. These cases are commented on in *The Queen v. The Justices of Derbyshire*, 1 Ellis, B. & E. 69, 73 (E. C. L. R. vol. 96), where Wightman, J., says: "The decision in *The Queen v. The Justices of the West Riding of Yorkshire* was on a different section of the present Highway Act, and was based on this, that the special sessions had greater powers for investigating the surveyor's accounts than the quarter sessions. It would have been an absurdity to send the accounts to the special sessions with power to examine the surveyor upon oath, and allow an appeal from their decision to a tribunal which could not do so, and might reverse the decision on account of the exclusion of his testimony." [KEATING, J.—The object of the 20 & 21 Vict. c. 43, was, to obtain the opinion of one of the superior Courts in \*315] cases where there were before no ready means of obtaining \*it. If this case is not within it, the Act will fall very far short of the intention of the legislature. This Court in *The London Union, app., Acocks, resp.*, 8 C. B. N. S. 760 (E. C. L. R. vol. 98), held that a refusal of justices to compel payment of money by a parish under an order of the guardians for contribution, is ground of appeal under the statute.] Where a poor or other rate of the same nature and incidents is good on the face of it, and unappealed against, the justices are bound to enforce it; and a case under this statute has been held not to be the proper mode of appealing from the justices' decision: *Wheeler, app., The Overseers of Burmington, resp.*, 29 Law J., M. C. 175 n.

*Macnamara*, in reply.—This is a determination by justices on a complaint made before them, and is clearly within the contemplation of the 2d section of the 20 & 21 Vict. c. 43. Neither appeal to the quarter sessions, nor certiorari, nor mandamus lies here: *The King v. The Jus-*

tices of the West Riding of Yorkshire, 5 T. R. 629; *The King v. Fowler*, 1 Ad. & E. 336 (E. C. L. R. vol. 28), 3 N. & M. 826 (E. C. L. R. vol. 28); *The Queen v. The Justices of Cambridge*, 8 Dowl. P. C. 89. The 14th section of the statute seems to assume that the opinion of a superior Court may be taken, even where an appeal lies to the quarter sessions; for, it enacts that "any person who shall appeal under the provisions of this Act against any determination of a justice or justices of the peace from which he is by law entitled to appeal to the quarter sessions, shall be taken to have abandoned such last-mentioned right of appeal finally and conclusively and to all intents and purposes."

WILLIAMS, J.—I am of opinion that this was a proper case to be stated for the decision of the Court under the statute 20 & 21 Vict. c. 43, or, in other words, that \*we have jurisdiction to hear it. The 2d section of the statute says, that, "after the hearing and de- [\*316 termination by a justice or justices of the peace of any information or complaint which he or they have power to determine in a summary way, by any law now in force or hereafter to be made, either party to the proceeding before the said justice or justices may, if dissatisfied with the said determination as being erroneous in point of law, apply in writing three days after the same to the said justice or justices to state and sign a case setting forth the facts and the grounds of such determination, for the opinion thereon of one of the superior Courts of law." The Act, therefore, is very general in its language, enabling the Courts at Westminster Hall to act in aid of the justices of the peace by correcting any errors into which they may have fallen, or giving them advice as to the law, in all cases in which there is a hearing and determination by them of any information or complaint in a summary way. Now, in the case in hand, it appears, that, by the 44th section of the Highway Act, within fourteen days after the election or appointment of a surveyor, the accounts, signed by the surveyor for the year preceding, of all moneys received and disbursed, are to be made up and laid before the vestry; and within one month after the election or appointment they are to be laid before the justices at a special sessions for the highways, which justices are authorized and required to examine the surveyor as to the truth of the accounts or of any charge contained therein. The section then goes on to provide, that, "if any person chargeable to the rate authorized to be made by this Act has any complaint against such accounts or the application of the moneys received by the said surveyor, it shall be lawful for any such inhabitant to make his complaint thereof to such justices at the time of the verification \*of such accounts as aforesaid, and the said justices are hereby [\*317 required to hear such complaint, and, if they shall think fit, to examine such surveyor upon oath, and to make such order thereon as to them shall seem meet." The case, therefore, seems to fall within the very words of the 2d section of the 20 & 21 Vict. c. 43. There is a complaint to the justices; and they have power to determine it in a summary way, and to make such order thereon as to them shall seem meet. The case is clearly within the words, and also, I think, within the general intention of the legislature, which was to enable the justices, in the exercise of their summary jurisdiction, to take the opinion of a Court of law in any matter which may arise before them.

WILLES, J., BYLES, J., and KEATING, J., concurred.

The case was sent back to the justices to be amended by stating the nature of the law proceedings in respect of which the sum objected to was incurred; and also to state more fully what were the objections taken by the appellant.

The amended case stated, that the whole of such bill of costs was incurred in respect of proceedings arising out of matters of appeal to the quarter sessions of Wilts, made by Messrs. Barnes, Freeman, and \*318] \*Woolford, inhabitants of the parish of Swindon, consequent on their having been assessed to a highway-rate of the parish of Swindon, dated the 9th of June, 1858, that the charges were arranged in such bill under separate headings therein; that, as to one part thereof, they appeared to commence with the first item of the date of the 30th of October, 1858, as the respondents' costs of appeal from the quarter sessions against a highway-rate, such appeal appearing to have been on a case stated from the quarter sessions for the opinion of the Court of Queen's Bench; that other part of the bill appeared to relate to costs of appeals by Messrs. Freeman, Woolford, and Barnes to the quarter sessions of Wilts; and that the remaining portion of the bill was "as to proceedings taken before justices in petty sessions at Swindon, and as to enforcing the payment of the costs in the above appeals."

They then stated, that, as in the said case it was found by them that the sum of 105*l.* 12*s.* 2*d.* appeared to have been incurred by the respondent as such surveyor in law proceedings, under the sanction of the inhabitants of the parish of Swindon in vestry assembled, they fully set out an extract of an entry in the vestry-book of the parish of Swindon referred to, and which was as follows:—

"Parish of Swindon. Notice is hereby given that a vestry will be held in the vestry-room of this parish on Thursday, the 23d day of September instant, at 10 o'clock in the forenoon, for the purpose of taking into consideration the notices of appeal against the highway-rate, given by William Amos Barnes, Henry Edwards Freeman, and William Woolford, and the steps which should be taken thereon. Dated this 18th day of September, 1858.

"JAMES WISE, Overseer.

"WILLIAM READ, Surveyor."

\*319] That, in pursuance of the above notice, a vestry was \*held in the vestry-room of the parish on Thursday the 23d of September, 1858, when it was proposed by Mr. George Reynolds, and seconded by Mr. Charles Hurt, and carried unanimously,—

"That the appeals by Mr. William Amos Barnes, Messrs. Henry Edwards Freeman, and William Woolford, against the rate made for the repairs of the highways of this parish, bearing date the 9th of June now last past, which appeals were entered at the general quarter sessions of the peace of our lady the Queen held at Westminster on Friday, the 29th of June last, at which sessions it was ordered that the hearing and determination of the said appeals be adjourned until the next general quarter sessions of the peace to be holden in and for the county of Wilts, be defended by the parish.

"N. B. Mr. Townsend, being professionally concerned for the appellants, declined to take any part in the above resolution.

"Proposed by Mr. J. C. Townsend, seconded by Mr. Hurt, and unanimously carried,—That Mr. Henry Kinneir, solicitor, be instructed by Mr. Read, the surveyor of the highways, to conduct the defence of the appeals mentioned in the last resolution."

The justices further stated that it appeared to them, that a vestry of the inhabitants of the said parish of Swindon was held on the 29th of March, 1860, for the purpose of passing the accounts for the past year of the surveyor of the said parish of Swindon, under the 5 & 6 W. 4, c. 50; and that, previously to such accounts being made up, balanced, and laid before the vestry to be examined and allowed, such bill of 105*l.* 12*s.* 2*d.* was inserted by such surveyor in his account, and at such vestry it was paid by the respondent as such surveyor to Mr. Kinneir, his solicitor, to whom the bill was due; and at such vestry the surveyor's accounts were produced, examined, and allowed.

\*Some immaterial statements were then introduced as to the taxation of the bill: and the justices proceeded to state, that [\*320 they found that the costs incurred in the said bill had been incurred after the inhabitants of the parish had agreed to defend such appeals against the highway-rate, as appeared by the extracts of the minutes of the vestry-book which they had above set forth; and that such bill of costs did not appear to them to have been allowed by two justices previously to the same having been charged in the said surveyor's account when laid before the vestry and paid by the surveyor.

The objections taken by the appellant were stated to be, amongst others, as follows:—"First, that the said respondent had charged in his account a bill of costs or law expenses, amounting to the sum of 105*l.* 12*s.* 2*d.*, incurred in or about defending certain appeals against the highway-rate for the parish of Swindon for the year 1858, before the same had been agreed to by the inhabitants of Swindon at a vestry convened for the purpose of considering the same, as required by the 111th section of the 5 & 6 W. 4, c. 50. Secondly, that the said respondent had charged in his account such bill of costs or expenses before the same had been allowed by two justices of the peace, as required by the same section of the said Act."

*Martin*, for the appellant, submitted that the assent of the vestry and the approval of two justices and an allowance by the justices in special sessions under s. 45, were necessary before the charges in question could be allowed under s. 111. And he referred to *The King v. Goodenough*, 2 Ad. & E. 463 (E. C. L. R. vol. 29).

*Phipson*, for the respondent.—The *King v. Goodenough* was a decision upon the 13 G. 3, c. 78. The 44th \*section of the 5 & 6 W. 4, c. 50, renders the intervention of two sets of justices [\*321 unnecessary. The 111th section of the latter Act is complied with where the expenses have been incurred with the assent of the vestry and allowed by two justices. The justices sit in special sessions under s. 45, not merely for the purposes of s. 44, but for those of s. 111 also.

*Martin* was heard in reply.

*Cur. adv. vult.*

*WILLIAMS, J.*, now delivered the opinion of the court:—

On the argument of this case before my Brothers Willes and Byles and myself, only one point was submitted for our consideration, viz., whether the justices sitting in special sessions for the highways ought

to have disallowed an item in the surveyor's account, of 105*l.* 12*s.* 2*d.*, in respect of law expenses.

The question turns on the 111th section of the General Highway Act, 5 & 6 W. 4, c. 50, by which it is enacted, "that, if the inhabitants of any parish shall agree at a vestry to defend any indictment found against any such parish, or to appeal against any such order made by or proceeding of any justice of the peace in the execution of any powers given by this Act, or to defend any appeal, it shall and may be lawful for the surveyor of such parish to charge in his account the reasonable expenses incurred in defending such prosecution, or prosecuting or defending such appeal, after the same shall have been agreed to by such inhabitants at a vestry or public meeting as aforesaid, *and* allowed by two justices of the peace within the division where such highway shall be; which expenses, when so agreed to *or* allowed, shall be paid by such parish out of the fines, forfeitures, payments, and rates \*322] authorized to be collected and raised by virtue of this Act: Provided, nevertheless, that, if the money so collected and raised is not sufficient to defray the expenses of repairing the highways in the said parish, as well as of defending such prosecution, or prosecuting or defending such appeal as aforesaid, the said surveyor is hereby authorized to make, collect, and levy an additional rate, in the same manner as the rate by this Act is authorized to be made for the repair of the highway."

The appellant's contention before us was, that, by reason of this enactment, the surveyor had no right to charge these law expenses in his account until after the same had been agreed to by the inhabitants at a vestry *and* had been allowed by two justices of the division.

It was remarked during the argument, that the section is inaccurately penned, inasmuch as, after saying that the surveyor may charge these expenses in his account after they shall have been agreed to at a vestry *and* allowed by the two justices, it proceeds to enact that the expenses, when so agreed to *or* allowed, shall be paid by such parish, &c. And it was suggested that the word "*or*" was plainly put by mistake for "*and*."

But we are of opinion that the inaccuracy rather consists in putting "*and*" for "*or*" in the earlier part of the section; and that it was intended that the surveyor should be allowed to charge the expenses in his account after they had been agreed to at a vestry *or* allowed by the two justices.

We are led to this conclusion not only by considering this construction to be the more reasonable one, but also by referring to the language of the 66th section of the earlier General Highway Act, 13 G. 3, c. 78, \*323] for which the 111th section of the present statute is \*plainly a substitute. It is in these words:—"And be it further enacted, that, if the inhabitants of any parish, township, or place shall agree, at a vestry or public meeting, to prosecute any person by indictment for not repairing any highway within such parish, township, or place, which they apprehend such person was obliged by law to repair, or for committing any nuisance upon any highways, or shall agree at such vestry meeting to defend any indictment or presentment preferred against any such parish, township, or place, it shall and may be lawful for the surveyor of such parish, township, or place to charge in his account the reasonable expenses incurred in carrying on or defending such respective prosecutions, after the same shall have been agreed to by such

inhabitants at a vestry or public meeting, or allowed by a justice of the peace within the limit where such highway shall be; which expenses, when so agreed to or allowed, shall be paid by such parish, township, or place, out of the fines, forfeitures, compositions, payments, and assessments authorized to be collected and raised by virtue of this Act."

In the case before us, therefore, we think the surveyor was entitled to charge the expenses in question after they had either been agreed to at a vestry or allowed by two justices. And we further think they appear to have been sufficiently agreed to at a vestry, having regard to what is stated in the case to have occurred at the vestry held on the 29th of March, 1860.

Consequently, we are of opinion that on this ground the sum in question was properly allowed by the justices in the surveyor's account. And it is therefore unnecessary to consider whether the respondent was also right in contending that the allowance by the justices in special sessions under the 44th section was \*a sufficient allowance by [\*324 two justices, within the meaning of the 111th section.

Our decision must, therefore, be for the respondent, and with costs.

Judgment for the respondent, with costs.

### RICHBELL and Wife v. ALEXANDER. May 6.

Where a right of action of the wife of a bankrupt or insolvent is of such a character, that, if vested in the bankrupt or insolvent alone, it would have passed to his assignees, the interest of the bankrupt or insolvent in such right of action of the wife passes to the assignees.

Where, therefore, the cause of action is, the conversion by the defendant to his own use of the goods of the wife before marriage, without special damage,—substantially for the value of the goods,—it falls within the above rule, and the assignees are necessary parties to the action.

Consequently, the action must be brought in the names of the assignees and the wife,—that being the only mode by which the assignees can, without the control or interference of the bankrupt, obtain the full benefit of the chose in action.

THIS was an action by husband and wife for the alleged conversion of the goods of the female plaintiff before the intermarriage of the plaintiffs, that is to say, household furniture, household utensils, glass-ware, crockery-ware, cutlery, linen, and other goods.

Fifth plea,—that, after the accruing of the alleged cause of action, and after the intermarriage of the plaintiffs and before suit, the plaintiff Thomas, then being a trader liable to become bankrupt within the true intent and meaning of the statutes in force concerning bankrupts, and being indebted to certain persons trading in copartnership, to wit, Messrs. Gunn, in the sum of 50*l.* and upwards, and having committed an act of bankruptcy, the said persons duly and according to the statute in that behalf presented a petition for adjudication of bankruptcy against the plaintiff Thomas, to the Court of Bankruptcy for the district within which the said Thomas had carried on business for six calendar months next immediately preceding \*the date and time of filing the said [\*325 petition,—the said petition being duly filed of record according to the said statute; and such proceedings were thereupon had that the said Court duly adjudged the said Thomas bankrupt, and forthwith after such adjudication appointed an official assignee of the estate and effects

of the said Thomas to act as in the said statute provided in that behalf: that afterwards certain persons were duly and according to the said statute in that behalf chosen and appointed assignees of the estate and effects of the said Thomas by the major part in value of the creditors of the said Thomas who had proved debts to the amount of 10*l.* and upwards: and that, by reason of the premises, and by force of the statute in such case made and provided, all the right and interest of the said Thomas to and in the said alleged cause of action in the declaration mentioned, became and were and are vested in the said persons as such assignees as aforesaid.

Sixth plea,—That, after the accruing of the said supposed cause of action, and after the intermarriage of the plaintiffs, and before the suit, the plaintiff Thomas, being then a prisoner in actual custody within the walls of a certain prison upon process for and by reason of a certain debt, did duly and according to the directions and provisions of the statute made and passed in the second year of Her Majesty Queen Victoria, intituled “An Act for abolishing arrest on mesne process in civil actions, except in certain cases, and for extending the remedies of creditors against the property of debtors, and for amending the laws for the relief of insolvent debtors in England” (1 & 2 Vict. c. 110), apply by petition in a summary way to the Court for the relief of insolvent debtors in England, for his discharge from such custody, according to \*326] the provisions of the said Act, which said petition contained \*all such matters and things as are in that behalf required by the said Act, and was duly subscribed by the said Thomas, and was forthwith filed in the said Court pursuant to the directions in the said Act contained; and that, after the filing of the said petition, and before this suit, the said Court for the relief of insolvent debtors did order that all the real and personal estate and effects of the said Thomas, both within this realm and abroad, except the wearing apparel, bedding, and other such necessities of the said Thomas and his family, not exceeding in the whole the value of 20*l.*, and all the future estate, right, title, interest, and trust of the said Thomas in or to any real and personal estate and effects within this realm and abroad, which might revert, descend, be devised or bequeathed, or come to him before he should become entitled to his final discharge in pursuance of the said Act, according to the adjudication made in that behalf, or in case the said Thomas should obtain his full discharge from custody or without any adjudication being made by the said Court, then before the said Thomas should be so fully discharged from custody, and all debts due or growing due to the said Thomas, or to be due to him before such discharge as aforesaid, should be vested in the provisional assignee for the time being of the estate and effects of insolvent debtors in England: that the said order was afterwards duly entered of record in the same Court: and that, after the making of the said vesting order, and before the commencement of this suit, such proceedings were had in the matter of the said petition that a certain person, to wit, one Peter Graham, was duly appointed assignee of the estate and effects of the said Thomas for the purposes of the said Act, and the said Peter Graham then accepted and duly signified his acceptance of the said appointment, according to the said Act \*327] in that behalf, \*and the said acceptance thereof by the said Peter Graham was then duly entered of record of the said Court;

and the said Peter Graham, by virtue of and according to the said Act, became and was and still is assignee of the estate and effects of the said Thomas for the purposes of the said Act, and all the right and interest of the said Thomas to and in the said alleged cause of action in the declaration mentioned became and were and are vested in the said Peter Graham as such assignee as aforesaid.

To these pleas the plaintiffs demurred, the ground of demurrer stated in the margin being, "that the wife is entitled to sue, and that the husband must be joined for conformity, and consequently the nonjoinder of the assignees can only be pleaded in abatement."

*Honyman*, in support of the demurrer. (a)—The main \*question here is whether the subject-matter of this action passed to the assignees of the husband either under the Insolvent or the Bankrupt Act; for, there is no material distinction for this purpose between the two. The 37th section of the 1 & 2 Vict. c. 110, vests in the provisional assignee of the insolvent Court all the debtor's "real and personal estate, both within this realm and all the future estate, right, title, interest, and trust of such prisoner in or to any real and personal estate and effects within this realm or abroad which such debtor may purchase, or which may revert, descend, be demised, or bequeathed, or come to him before he shall become entitled to his final discharge in pursuance of the Act." And the 141st section of the 12 & 13 Vict. c. 106, vests in the assignees of the bankrupt "all his personal estate and effects, present and future, wheresoever the same may be found or known, and all property which he may purchase, or which may revert, descend, be devised or bequeathed, or come to him before he shall have obtained his certificate, and all debts due to him, wheresoever the same may be found or known, and the property, right, and interest in such debts." Now, a debt due to the wife before marriage, or a cause of action accruing to the wife before the marriage, does not by the marriage vest in the husband. He has a right to intervene during the coverture: but, if he omit to do so, the right passes on the death of the wife to her executor or administrator. Suppose there had been no bankruptcy or insolvency here, the husband could not have sued alone for the conversion of these goods: neither can his assignees. It may be that the assignees might be entitled to the benefit of the proceeds when realized: but that is quite another question. In *Jeffery v. M'Taggart*, 6 M. & Selw. 126, it was held that a trustee under the Scotch Bankrupt Act, 54 \*G. 3, c. 137, could not sue in his own name for a chose in action. [\*328  
[\*329  
*Michell v. Hughes*, 6 Bingh. 689, 4 M. & P. 597, where it was held that a right of entry vested in husband and wife in right of the wife passed

(a) The points marked for argument on the part of the plaintiffs were as follows:—

"That choses in action of the wife do not vest in the assignees of the husband, so as to divest her right,—that her right continues,—that she may sue in respect of her right,—that her husband must sue with her for conformity,—that the right of joining with the wife for conformity in an action when she is a party does not vest in the assignees,—that the assignees, perhaps, might join with the husband and wife, but cannot sue alone,—that the non-joinder of the assignees, if pleadable at all, is pleadable only in abatement,—that the count does not misstate the cause of action, and, if the assignees were co-plaintiffs, it would not require one word of alteration,—that, if the assignees are interested, payment to them, and acceptance in satisfaction, might be pleaded before judgment, and would be a ground for relief by *audita querela* after judgment,—that the pleas do not show that the assignees have intervened and claimed the right of reducing the chose into possession,—and that the right of suing does not vest in the assignees at all."

to the assignees of the husband on his bankruptcy, was decided mainly upon the authority of *Miles v. Williams*, 1 P. Wms. 249, 10 Mod. 160, 248, which is much shaken, if not overruled, by the judgment of the Exchequer Chamber in *Sherrington v. Yates*, 12 M. & W. 855, 864.† *Michell v. Hughes* also proceeded on the ground that there was an estate of freehold which vested in the husband himself. Tindal, C. J., in giving judgment, says: "If the husband had been actually seised of this land in right of his wife, the assignees would have taken, under the bargain and sale, an immediate estate of freehold during the coverture: Com. Dig. *Bankrupt* (D. 11). It is unnecessary, therefore, to consider any claim of the husband as tenant by the curtesy; it is sufficient for the present purpose to observe, that, if the wife's seisin had been a seisin in fact, the husband would have become seised of the freehold in her right during the coverture." [WILLES, J.—That was a case of real estate, where the husband has an interest during the joint lives.] Yes. The husband takes a freehold interest during the joint lives of himself and his wife in land belonging to her in fee simple; and such interest passes by the deed of the husband alone: *Robertson v. Norris*, 11 Q. B. 916 (E. C. L. R. vol. 63). In *Yates v. Sherrington*, 11 M. & W. 42,† the Court of Exchequer,—upon the authority of *Miles v. Williams*,—held, that the assignees of a bankrupt might maintain an action in their own names only, for a chose in action belonging to the wife of the bankrupt before marriage, as, a promissory note given to her *dum sola*. But that decision was reversed by the Exchequer Chamber: *Sherrington v. Yates*, 12 M. & W. 855.† In \*delivering the judgment  
 \*330] of the Court there, Tindal, C. J., says: "There can be no doubt, after the case of *Gaters v. Madeley*, 6 M. & W. 423,† in which all the preceding cases are considered, that a promissory note given to the wife before her marriage is a chose in action which the husband may reduce into possession if he think fit, by bringing an action thereon in the name of himself and his wife, but which, if not so reduced into possession, will survive to the wife. In case, therefore, an action had been brought in that form, if the husband had died before judgment, the right of action would have survived to the wife, who might, by entering a suggestion upon the roll of her husband's death, have prosecuted the suit to judgment for her own sole use; and, even if judgment had been signed before her husband's death, but no execution levied, the benefit of the judgment would have survived to the wife. But the assignees of the husband, by bringing the action in their names alone, have deprived the wife of this possible benefit; for as she is not a party to this record, she cannot make any suggestion upon it, or entitle herself to any advantage upon her husband's death. And, as the assignment in bankruptcy has not the effect of reducing into possession a chose in action belonging to the wife, so as to destroy her rights of survivorship,—*Mitford v. Mitford*, 9 Ves. 87,—and, again, as the bankrupt laws do not profess to vest any property in the assignees other than that which was the property of the bankrupt himself (the case of reputed ownership excepted), it would follow that the assignees cannot deprive the wife of any interest which she has in a chose in action, nor of any contingent benefit or advantage which might accrue to her in the endeavour to reduce such chose in action into actual possession. Upon principle, therefore, we think that no more passes to the assignees than the hus-

band \*himself had; and, if he had no right by law to sue alone, [\*331 without joining the wife, so neither would the assignees.] [BYLES, J.—The Court, however, go on to say that they can see no reason for objecting to the assignees joining the wife.] That point was not argued; and it is a mere suggestion thrown out upon the supposed authority of a dictum of the Vice-Chancellor in *Pierce v. Thornely*, 2 Smons 167. [WILLES, J.—All powers which the insolvent may execute for his own benefit, may be executed by the assignees for the benefit of the creditors.(a) BYLES, J.—A promissory note given to a woman during coverture vests in her husband, and would go to his assignees: yet, if the husband does not reduce it into possession in his lifetime, it survives to the wife.] The husband might sue upon it in his own name. [BYLES, J.—No doubt: but his assignees could not.] The reason why the husband is required to join for the recovery of a debt due to the wife *dum sola*, is, that husband and wife are considered in law as one person. The same reason does not apply in the case of assignees. The plea should at all events show some interference on the part of the assignees. In *Herbert v. Sayer*, 5 Q. B. 965, 981 (E. C. L. R. vol. 48), Tindal, C. J., says: "All future property and contracts vest in the assignees by the words of the statute 6 G. 4, c. 16, ss. 63, 127, and by the construction put by the Courts on the words of the older statutes. But there must be property in the *bankrupt*, or *contracts with him*, before such property or contracts can vest in the assignees." It may be that the action should be brought in the names of the *husband*, the *wife*, and the assignees.

*Phipson*, contra.(b)—Although this case presents \*itself in a new aspect, there can be little or no difficulty on principle or [\*332 analogy to decided cases. The assignees are entitled to all the property legal and equitable to which the husband is beneficially entitled. A debt or a chose in action of the wife *dum sola* falls within this category. [ERLE, C. J.—I had a notion the property was the wife's, and that the husband's interest commences only upon the execution executed. Up to that time, he has a duty of curtesy to lend his name for the purpose of reducing it into possession.] The first question is, what is the husband's interest in the wife's choses in action? It is submitted that they are by the marriage vested in the husband, subject to the condition of their being reduced into possession during the coverture. In Butler's note (304) to Co. Litt. 351 a (cited by Coltman, J., in *Fitzgerald v. Fitzgerald*, 8 C. B. 592, 601 (E. C. L. R. vol. 65)), it is said: "With respect to such part of the wife's personalty as is not in her possession,—as, money owing or bequeathed to her, or accrued to her in case of intestacy, or contingent interests,—these are a qualified gift by law to her husband, on condition that he reduce them into possession during the coverture; for, if he happen to die in the lifetime of his wife, without reducing such property into possession, she, and not his representa-

(a) 1 & 2 Vict. c. 110, s. 49. And see 12 & 13 Vict. c. 106, s. 147.

(b) The points marked for argument on the part of the defendant were as follows:—

"1. That, as the assignees, as representing the husband, must be joined, the husband ought not to be joined, and there is, as respects the husband, a misjoinder:

"2. That, if the husband must be joined for conformity with the wife, the non-joinder of the assignees is nevertheless fatal to the action, and not merely matter of plea in abatement;

"3. That the plaintiff ought not to have demurred, but to have replied such facts (if they exist) as would answer the legal objection raised by the pleas."

tives, will be entitled to it." That is the true view. "By the inter-  
 \*333] marriage, the husband acquires such an interest \*in all debts due to the wife, that he may release them, and such release shall bind the wife. So, all rights accruing to the wife during coverture may be released by the husband:" Bac. Abr. *Release* (F). So, in Rolle's Abridgment, *Releas* (D), it is said; "Le releas del baron est bon barr del dett due al feme devant coverture:" 7 E. 3, fo. 69. Sheppard's Touchstone, 333, is to the same effect,—“Any man may release any debt or duty due to himself. Also a man may discharge or release anything due, or any wrong done, to his wife before or after the marriage. And therefore, if a trespass were done or a promise were made to my wife before the marriage, I may at any time during the marriage release this. So, if any wrong be done, or obligation, statute, or promise made to her alone, or to her and me together, at any time during the marriage, I alone may release and discharge this. And, if my wife be an executrix to any other man, I may release any debt or duty due to the testator.” And see Com. Dig. *Baron and Feme* (F), (O). In *Stooke v. Vincent*, 1 Coll. C. C. 527, a plea of a release executed by the husband was allowed to be good. If, then, the husband may receive a debt due to his wife, may sell her chose in action, and may release a debt or duty owed to her or a wrong done to her, why should not his assignees have all the interest that he is entitled to? In *Roper on Husband and Wife*, Jacobs's edit. 281, 2, it is said: “With respect to the legal choses in action of the wife, it was the opinion of Lord Macclesfield, in *Miles v. Williams*, 1 P. Wms. 255, 10 Mod. 160, 243, that the assignment in bankruptcy passed them freed from the wife's right of survivorship, and that the assignees might under the statute 1 Jac. 1, c. 25, sue for them in their own name, either before or after the husband's death. This was followed in *Bosvil v. Brander*, 1 P. Wms. 458; but, in *Ex parte Coysegame*, \*1 Atk. \*334] 192, Lord Hardwicke thought that the statute only gave the assignees such right of action as the bankrupt might have had. The cases of *Miles v. Williams* and *Bosvil v. Brander* were reviewed in *Mitford v. Mitford*, 9 Ves. 87, and the judgment in the latter case applies in principle to legal as well as to equitable debts. It seems, therefore, that the legal choses in action of the wife (with the exception of those over which her husband has an absolute power of alienation), will survive to the wife, as against the husband's assignees in bankruptcy, unless reduced into possession in his lifetime. If, then, Courts of equity pursue the legal analogy, it seems to follow, that, since the husband is enabled at law to *release* his wife's choses in action, in which he has an *immediate* interest, or an interest expectant upon an event which may by possibility happen during the marriage, that class of his assignees before described will have a right to dispose of such choses in action for value, if the disposition be made during the coverture, and that it will defeat the wife's title by survivorship.” In *Drake v. Beckham*, 11 M. & W. 315,† the Exchequer Chamber,—reversing the judgment of the Court of Exchequer in *Beckham v. Drake*, 8 M. & W. 846,† 9 M. & W. 79,†—held, that a right of action for a wrongful dismissal of the bankrupt from a situation in a type-foundry, passed to the assignees: and this decision of the Court of error was upheld by the House of Lords: *Beckham v. Drake*, 2 House of Lords Cases 579. [KEATING, J.—“Principally,” as is said in *Smith's Mercantile Law*, 5th edit. 642, “on the ground that

the agreement contained a stipulation for payment of 500*l.* as a penalty for any breach, and the declaration was founded upon and claimed it."'] *Miles v. Williams* was only overruled as to one point, viz., as to the right of the assignees to sue in their own names: \*but, as to the main point, it has never been doubted. In *Shelford's Bankrupt Law*, [\*335 209, it is said: "Whatever interest a husband acquires by marriage in the wife's property, all that he can himself dispose of, either of her legal or equitable interest, passes to his assignees. The rents and profits of her real estate they take during the coverture; her personal chattels in possession absolutely; her chattels real and choses in action, mortgages, debts, and legacies, in the same manner as they vested in the husband, or such interest therein as he could himself have assigned or released,"—citing *Miles v. Williams*, 1 P. Wms. 249, 10 Mod. 160, 243, *Bosvil v. Brander*, 1 P. Wms. 458, *Higden v. Williamson*, 3 P. Wms. 131, *Gray v. Kentish*, 1 Atk. 280, *Robinson v. Taylor*, 3 Bro. C. C. 589, and *Pringle v. Hodgson*, 3 Ves. 617. In *Pierce v. Thornely*, cited in *Yates v. Sherrington*, it was contended that the mere filing a bill was a sufficient reduction into possession by the assignee: but Vice-Chancellor Shadwell ruled that it was not. [ERLE, C. J.—In *Yates v. Sherrington*, the assignees sued alone. That clearly will not do. How is that consistent with Mr. Butler's proposition?] Mr. Butler's note does not clash with the ultimate decision in that case. The chose in action of the wife cannot be reduced into possession without joining the wife: if the assignees of the husband wish to sue, they must adopt the same course as the husband would. It was never objected in *Pierce v. Thornely* that the assignee could not have sued jointly with the wife. The Vice-Chancellor says: "If the husband of the wife, who had a debt due to her *dum sola*, had become bankrupt, the assignees could not recover payment of the debt without bringing an action in their own names and the name of the wife jointly; for, by the commissioners' assignment, they take an interest in the debt in the same manner as the husband had it: and if, \*after proceeding in the action, and before execution levied, [\*336 the husband died, at law the chose in action would survive to the wife, and she might release the action, as a co-plaintiff, or release the debt, as entitled to it by survivorship. At law, the wife's chose in action could be recovered only in an action in which she was made co-plaintiff with her husband, or with his assignees, in case he became a bankrupt. If the chose in action were equitable, the wife is not of necessity to be made a co-plaintiff; she must be a party to the suit. This was decided in *Clarke v. Lord Angier*, 1 Ch. Ca. 41: but she may be either defendant or a co-plaintiff. At law, where judgment had been recovered by the husband and wife, the husband alone could levy execution: but a Court of equity will not, unless the wife consents, permit the husband to recover the whole of his wife's chose in action, but will require a settlement to be made upon her. In so doing, a Court of equity not only recognises the legal principle that the wife might be entitled by survivorship, but acts upon it for her benefit in a manner which a Court of law cannot do." If that be law, it ought to decide this case.

*Honyman*, in reply, referred to *Gaters v. Madeley*, 6 M. & W. 423,† *Guyard v. Sutton*, 3 C. B. 153 (E. C. L. R. vol. 54), *Hunt v. Stephens*, 6 Q. B. 937 (E. C. L. R. vol. 51), *Scarpellini v. Atcheson*, 7 Q. B. 864 (E. C. L. R. vol. 53), *Ellison v. Elwin*, 13 Simons 309, and *Ashby v.*

Ashby, 1 Coll. C. C. 558: and he submitted that *Miles v. Williams* was overruled so far as applicable here, that the note in *Sherrington v. Yates*, and that this action could only be properly brought by the husband and wife, the cause of action being no part of the husband's estate. *Cur. adv. vult.*

\*337] \*WILLES, J., now delivered the judgment of the Court: Two questions were raised in this case,—first, whether the right to the damages sought to be recovered, considered as property, did pass to the assignees in bankruptcy or insolvency of the husband,—and, secondly, whether, if so, the assignees were necessary parties to the action, so that the present action, brought by the husband and wife, is substantially defective.

As to the first point, it is settled law, that, where a right of action of the bankrupt's wife is of such a character, that, if vested in the bankrupt or insolvent alone, it would have passed to the assignees, the interest of the bankrupt or insolvent in such right of action of the wife does pass to the assignees. Here, the cause of action, which is simply for the conversion by the defendant to his use of the female plaintiff's goods, without special damage,—substantially, therefore, for the value of the goods,—falls clearly within the above class; and it would have passed to her assignees, if she before her marriage had become bankrupt or insolvent. Her husband's interest, therefore, to release the damages, or to sue for them and obtain payment thereof by execution or otherwise during their joint lives, passed to his assignees in bankruptcy or insolvency, which ever had priority,—with an exception which is more apparent than real, of property parted with by way of fraudulent preference, in respect of which the bankrupt or insolvent never has had any right of action,—vest absolutely in the assignees, who elect to take such rights by accepting their appointment.

It follows, that, in our opinion, the interest of the bankrupt passed to the assignees, of course in the same plight in which the bankrupt had \*338] it, subject to the \*condition that it should be reduced into possession during the joint lives of the husband and wife.

There remains the question whether the assignees are necessary parties to the action, it being clear that they must have a right to sue in some form. As for suing in the names of the assignees alone, that is excluded by the decision in *Sherrington v. Yates*, 12 M. & W. 855.†

As for the present form of action, in the names of the bankrupt and wife, there seems no good reason why the assignees should, contrary to the ordinary rule upon the construction of the Bankrupt and Insolvent Acts, sue in the name of the bankrupt or insolvent, when all his interest is vested in them, together generally with like remedy to recover in their own names as the bankrupt or insolvent would have had but for the bankruptcy or insolvency. When Tindal, C. J., in *Sherrington v. Yates*, suggested that possibly an action might be brought in the names of the husband and wife, he pointed out at the same time the necessity, upon that assumption, in case of a plea like those here relied upon, for a replication stating that the action was brought for the benefit of the assignees. There is no such replication in the present case; and if there were, it is difficult to see how it could sustain the action.

There only remains an action in the names of the assignees, the bankrupt, and the wife, or of the assignees and the wife. An action at the

suit of the bankrupt, the assignees, and the wife, would be objectionable, upon the ground that the bankrupt has no longer any legal interest in the action, for, his right is absolutely transferred in statu quo to the assignees. If it be objected that the husband ought to join "for conformity," as it has been said, the answer is, that the rule that the husband must join for \*conformity is not universal even at the [\*339 common law; and that the cases in which it has been applied are cases in which the husband has had an interest in the cause of action; whilst the present is a new case, created by statute, in which he has no such interest. If it be said that the husband ought to join, in order to appoint an attorney for his wife, the answer may be, that, in point of form, she can sue in person. If it be objected that the assignees ought not to be allowed to use her name without her consent, the answer is, that her husband might have done so, and his right is transferred in statu quo to his assignees.

Upon these grounds, we hold that the alternative suggested by Tindal, C. J., in *Sherrington v. Yates*, and to the adoption of which the Court of Cam. Scac. in that case saw no objection, namely, an action in the names of the assignees and the wife, is the correct one, that being the only mode by which the assignees can without the control or interference of the bankrupt obtain the full benefit of the chose in action.

Upon the ground, therefore, that the assignees are entitled, and are necessary parties to the action, we give judgment for the defendant.

Judgment for the defendant.

### \*CASTRIQUE v. IMRIE and Others. April 23. [\*340

Error having been brought upon a judgment for the plaintiff in this Court, a Judge's order was made, by consent, under which a sum of 3000*l.* was invested by the defendants in Consols. in the joint names of the respective attorneys, "in lieu of bail in error herein, to abide the further order of this Court." The judgment having been reversed by the Exchequer Chamber:—Held, that the defendants were entitled to have the proceeds of the stock restored to them.

JUDGMENT having been given for the plaintiff upon a special case in this Court, the amount of damages to be assessed by an arbitrator (vide 9 C. B. N. S. 1), the defendants brought a writ of error, whereupon it was agreed between the attorneys for the respective parties, that, in lieu of giving bail in error, the defendants should cause a sum of 3000*l.* to be invested in Consols or Exchequer Bills, in the joint names of the attorneys, to abide the further order of this Court; and accordingly the following order was made by Keating, J., on the 11th of April, 1860:—

"Castrique v. Imrie and Others.	}	"Upon hearing the attorneys or agents on both sides, and by consent, I do order that the defendants do within ten days invest the sum of 3000 <i>l.</i> in Consols or Exchequer Bills, in the joint names of Mr. H. D. L., the plaintiff's attorney, and of Mr. E. W. F. and H. R., the defendants' agents, <i>in lieu of giving bail in error herein, to abide the further order of this Court</i> ; and that thereupon all proceedings on the reference provided for by the agreement of reference of the 25th of October, 1859, be stayed until after the proceedings in error are disposed of, such proceedings to be commenced, and the case set down for argument, in
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the Exchequer Chamber during this next Easter Term, or otherwise the judgment to be final, save as to the arbitration and taxation hereinafter provided: And I further order, that, for the purpose of enabling the defendants to carry in the judgment-roll herein, upon which to suggest and bring error, the judgment be entered up by the plaintiff forthwith for the sum of 2500*l.* and 500*l.* costs, subject, in case the plaintiff \*341] obtains judgment in the Court of error, to the said sum of 2500*l.* being increased or reduced by the arbitrator appointed by the said agreement of reference, who is by consent of the parties to, allow interest to the plaintiff on the amount awarded by the arbitrator at 4 per cent. from the 25th of February last, and also subject to the said sum of 500*l.* being increased or reduced by the master on taxation of the plaintiff's costs if the plaintiff succeeds, as aforesaid."

The 3000*l.* was accordingly invested in 3 per cent. Consols.

On the 8th of February, 1861, the Exchequer Chamber gave judgment for the defendants, reversing the judgment of this Court,—9 C. B. N. S. 451 (E. C. L. R. vol. 99): and thereupon the plaintiff's attorney gave notice of appeal to the House of Lords.

On the 12th of February, the defendants' attorneys applied to a Judge at Chambers for an order that the sum of 3166*l.* 4*s.* 6*d.* Consols, the produce of the 3000*l.* so invested as aforesaid, should be sold, and the proceeds handed over to the defendants' attorneys: but the learned Judge declined to make the order, referring the parties to the Court.

*C. Hutton* now moved for a rule nisi to the same effect.—He submitted that the condition upon which the money was invested having been satisfied, the defendants were entitled to have it restored to them; and that, if bail in error had been put in, the bail would have been discharged on the reversal of the judgment. He referred to the 151st section of the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76.(a) [BYLES, \*342] *J.*, referred to *James v. Cochrane*, 9 \*Exch. 552.†] There, the judgment was simply for costs, and therefore that case has no application here.

*Holl* showed cause in the first instance.—By the terms of Mr. Justice Keating's order, the 3000*l.* was to be invested to stand in the place of bail in error, to be a security for the judgment until the proceedings in error were disposed of. Those proceedings are still pending. [BYLES, *J.*—The words of the agreement would rather seem to contemplate the proceedings in the Exchequer Chamber. There is not the least reference to any higher Court of error. The words of the agreement,

(a) Which enacts, that, "upon any judgment hereafter to be given in any of the said superior Courts of common law in any action, execution shall not be stayed or delayed by proceedings in error, or supersedeas thereupon, without the special order of the Court or a Judge, unless the person in whose name such proceedings in error be brought, with two, or, by leave of the Court or a Judge, more than two, sufficient sureties, such as the Court (wherein such judgment is or shall be given) or a Judge shall allow of, shall, within four clear days after lodging the memorandum alleging error, or after the signing of the judgment, whichever shall last happen, or before execution executed, be bound unto the party for whom any such judgment is or shall be given, by recognisance to be acknowledged in the same Court, in double the sum adjudged to be recovered by the said judgment (except in case of a penalty in double the sum really due and double the costs), to prosecute the proceedings in error with effect, and also to satisfy and pay (if the said judgment be affirmed, or the proceedings in error be discontinued by the plaintiff thereon) all and singular the sum or sums of money and costs adjudged or to be adjudged upon the former judgment, and all costs and damages to be also awarded for the delaying of execution, and shall give notice thereof to the defendant in error or his attorney."

therefore, seem to coincide with the old practice on the subject of bail in error.] The effect and the intention of the order, it is submitted, \*evidently were, to leave the matter entirely in the discretion of the Court. The proceedings in error cannot be said to be finally [\*343 determined until judgment has been given by the House of Lords.

*Hutton*, in support of the rule, was stopped by the Court.

ERLE, C. J.—I am of opinion that the defendants are entitled to have money out of the Court. The order of my Brother Keating discloses all the terms of the agreement between the parties. I think that agreement was, that the 3000*l.* should be invested in lieu of bail in error to the Exchequer Chamber. If bail had been put in in the ordinary way, their recognisance would have been discharged on the reversal of the judgment of this Court by the Court of error. The agreement which the parties came to was merely that the 3000*l.* should be invested in lieu of bail in error, and subject to all the incidents of bail in error. I think the rule must be absolute.

WILLES, J.—I am entirely of the same opinion. If this money had been by agreement invested to abide the event of the suit, possibly the plaintiff's contention would have been sustainable. But, according to the only construction which I can put upon the order of my Brother Keating, it was only to be invested to stand in the place of bail in error. Looking at the provision in the statute, and at the forms given in Tidd's Appendix, pp. 532, 533, and Chitty's Forms, pp. 281, 282, it seems to be clear, that, if this judgment had been affirmed, the defendants must have put in a new recognisance of bail to the House of Lords. That shows that the construction of the recognisance of bail in error is that it is applicable to the Exchequer \*Chamber, and its effect ex- [\*344 hausted when the judgment is affirmed by the Court. Consequently, on the reversal of the judgment by the Exchequer Chamber, the bail in error would be discharged, and of course the money which was invested as a substitute for bail in error, is to be restored to the defendants.

BYLES, J.—I am of the same opinion, and for the same reasons.

Rule absolute, with costs.

### In re ANNE SMITH. April 24.

A commission for taking the acknowledgment of a married woman abroad, under the 3 & 4 W. 4, c. 74, was addressed to "Robert Roger Strong, registrar of the Supreme Court of Wellington, New Zealand," and on its return the acknowledgment was found to have been taken by "Robert Rodger Strang, registrar of the Supreme Court of Wellington,"—Held, that the objection might be got over by a slight explanation on affidavit showing the identity of the party.

But, held, that an objection that the affidavit was sworn before "J. K., a solicitor of the Supreme Court of W., and a commissioner for taking affidavits there," was insurmountable.

PHIPSON moved that the proper officer should be directed to receive and file the certificate and affidavit of an acknowledgment under the 3 & 4 W. 4, c. 74, taken under a special commission at Wellington, in New Zealand, both which documents were defective.

The commission was addressed to "Robert Roger Strong," who was

described as "registrar of the Supreme Court of Wellington," and the acknowledgment appeared to have been taken by "Robert Rodger Strang, registrar of the Supreme Court, Wellington, New Zealand." It appeared from inquiries which had been made at the colonial office that the proper name of the registrar of the Supreme Court was Robert Rodger Strang; and it was submitted on the authority of *In re Anna Booth*, 5 C. B. N. S. 541 (E. C. L. R. vol. 94), that \*very slight  
\*345] corroborative evidence would suffice to get over such an objection.

The affidavit of verification purported to be sworn before "John King, a solicitor of the Supreme Court of Wellington, and a commissioner for taking affidavits there." The rules of Court relating to acknowledgments contain no regulations as to the mode of swearing affidavits: but the practice has been in accordance with the regulations prescribed by the rule of Court of Hilary Term, 14 G. 3, as to common recoveries, which regulations had been previously adopted as to fines: see *Cruttenden v. Bourbel*, 1 Taunt. 144. By that rule it was ordered, "that, if the party or parties shall be in Ireland or in any other part or parts beyond the seas, then the affidavit or affidavits shall be made by one of the commissioners who hath taken the acknowledgment of the warrant or warrants of attorney, and shall be sworn either before some person duly authorized to take affidavits in this Court, or before some magistrate of the place where such acknowledgment shall be taken, having authority to administer an oath, and in the presence of a public notary, which notary shall also certify in writing under his hand and seal, as well the due administering of this oath, as also the name, signature, and office of the magistrate administering the same." Here, there was no notarial certificate. In *Ex parte Bayley*, 2 Scott, N. R. 523 (nom. *Ex parte Daly*), 9 Dowl. P. C. 380 (nom. *Ex parte Davy*), 2 M. & G. 424, where the affidavit was sworn in Russia before a British consul, the Court required an affidavit that there was no local magistrate in that country having authority to administer oaths. But here the question is somewhat different: and probably the Court may presume that a solicitor of the Supreme Court at Wellington has power to take affidavits there. [KEATING, J.—There are magistrates in New  
\*346] Zealand: \*the constitution of that settlement is regulated by Act of Parliament.]

ERLE, C. J.—As to the first point,—the names being almost identical,—a slight corroboration by affidavit would suffice to get over the objection. But, as to the other, I think the objection is a fatal one: the commission must go back in order that the affidavit may be sworn before a person having due authority to take it.

The rest of the Court concurring,

Rule refused.

In re LADY FRANCES HENRIETTA DALLAS. *May 4.*

The officer appointed under the 3 & 4 W. 4, c. 74, is justified in declining to receive and file an acknowledgment of a deed by a married woman, conveying her interest in certain property, where a provision is to be made for her in lieu of such her interest, and the commissioner merely certifies that the deed declaring the trusts of that provision "has been already engrossed, and was produced before him:" and the Court will not make any order on the subject until they are satisfied that the deed has been duly executed.

MANLEY SMITH moved that the proper officer might be directed to receive and file the certificate and affidavit of an acknowledgment under the 3 & 4 W. 4, c. 74, by Lady Frances Henrietta, the wife of Sir Robert Dallas, which had been taken at Paris.

It appeared upon affidavit that the consideration for the release by Lady Dallas of her interest was to be an annuity arising from a sum of 3333*l.* 6*s.* 8*d.* 3 per cent. Consols, to be invested in the names of trustees for that purpose; that Sir Robert and Lady Dallas being at Paris, the deeds were sent there for execution, with a commission for taking the acknowledgment of Lady Dallas under the statute, but the deed declaring the trusts of the 3333*l.* 6*s.* 8*d.* had not then been executed by [\*347 the trustees. The engrossment was however sent, and also the stock receipt showing that that amount of stock had been duly invested.

The affidavit of verification, sworn by Robert Ormond Maugham, one of the commissioners, stated "that the said Frances Henrietta Lady Dallas declared that a provision was to be made for her in consequence of her giving up such her interest in the said estate; and that, before her acknowledgment was so taken, he (the commissioner) was satisfied, and does now verily believe, that such provision has been made by an investment in the government funds in the names of trustees for the benefit of the said Frances Henrietta Lady Dallas, as explained in a deed *already engrossed*; and that such deed has been produced to this deponent and the said Edmund Alexander Wilson, the other commissioner."

It was objected at the office that this affidavit was insufficient, inasmuch as it merely showed that the deed declaring the trusts of the 3333*l.* 6*s.* 8*d.* consols had been *engrossed*, and did not show that it had been *executed* by the proper parties.

Application was thereupon made to Williams, J., at Chambers, but he declined to entertain it, and referred the parties to the Court.

It now appeared that the deed had since been duly executed, and therefore it was submitted that all the requirements of the rule of Hilary Term, 1834, had been complied with.

ERLE, C. J.—The officer did quite right in sending the matter to the Court; and it behoves us to look carefully into it to see that the rights of the lady are properly secured to her. Let it be referred to some member of the Court now present; and, on the \*production of [\*348 the deeds before him, he will give the proper direction to our officer.

The parties accordingly attended before Willes, J., at Chambers, and produced the deeds; and, the learned Judge being satisfied that all had been regularly and properly done, the order was made as prayed.

Fiat.

**WILSON and Others v. MIERS and Others. Jan. 23.**

By the deed of settlement of a joint stock Company, its business was declared to be "to build or purchase and own or hire iron steam-vessels, and to use or let upon hire the same for the purpose of transport of coals or other merchandise from any port or ports of the united kingdom, or elsewhere, to any other port or ports of the united kingdom, or elsewhere:" and the powers of the directors were defined to be, amongst other things, "the building or purchasing or hiring of such steam-vessels as they should see fit," the selling and letting to hire and chartering of the vessels," "the general conduct and management of the business of the Company," and "the controlling, managing, and regulating, in all other respects except as by those presents otherwise provided, of all matters relating to the Company, and the affairs thereof."

The directors, thinking it expedient to sell all the vessels belonging to the Company, employed the plaintiffs, ship-brokers, to procure a purchaser. The plaintiffs accordingly negotiated a sale of the vessels upon the terms fixed by the directors, with one C.; the negotiation, however, went off, upon an objection urged by C.'s solicitor that the directors had no power to sell the whole of the vessels, except in the event of the winding up of the Company with the consent of the shareholders,—which had not been obtained.

Held, that the plaintiffs were not, under the circumstances, entitled to maintain an action against the directors upon an implied warranty, that they had authority to sell, which in point of fact they had not.

*Quære*, as to the measure of damages in such a case, if the action had been maintainable?

THIS was an action for an alleged breach of an implied warranty by the defendants that they had authority to sell certain ships.

The first count of the declaration stated that the plaintiffs being ship-brokers, whose business consisted of introducing merchants desirous of purchasing or chartering ships to shipowners having ships for sale or charter, and of negotiating business between such merchants and shipowners, for certain commission to be paid to the plaintiffs in that behalf,  
 \*349] the defendants \*representing themselves as directors of and as acting for and on behalf of a certain Company called The General Iron Screw Collier Company, Limited, and also representing that the said Company was ready and willing to sell certain ships belonging to the said Company, and was desirous of meeting with a purchaser, in consideration that the plaintiffs as such brokers would take instructions from the defendants as directors of the said Company, and would through the defendants, as representing the said Company, agree with the said Company to render and would render to the said Company their services as brokers as aforesaid in endeavouring to obtain a purchaser for the said ships, upon the terms that if the plaintiffs should be successful in introducing a purchaser who actually closed a bargain with the said Company for the purchase of the said ships, the plaintiffs should be paid by the said Company a commission of 5*l.* per cent. upon the amount of the purchase-money, but that if the plaintiffs should not so succeed, then that they should be paid nothing for their services, the defendants warranted that they had power and authority to give such instructions on behalf of the said Company, and to effect an agreement between the said Company and the plaintiffs on the terms aforesaid: Averment, that the plaintiffs did take instructions from the defendants, and agreed to the said terms, and they expended great time, trouble, and expense in rendering their services for the purposes aforesaid, and in negotiating the terms of purchase between the defendants as representing the said Company and certain merchants introduced by the plaintiffs as willing to become purchasers of the said ships, and the said merchants intro-

duced by the plaintiffs were ready and willing and offered to purchase the said ships from the said Company upon terms finally concluded and agreed upon between them and \*the defendants as representing [\*350 the said Company; and the plaintiffs performed all conditions precedent, and all times elapsed, and all matters and things were done and happened to entitle the plaintiffs to have the said warranty performed and complied with on the part of the defendants: Breach, that the defendants broke their warranty, in this respect, that they had no authority or power to give such instructions on behalf of the said Company, nor to make an agreement for the said Company with the plaintiffs on the terms aforesaid; by reason whereof the said supposed agreement between the said Company and the plaintiffs was not the agreement of the said Company, nor binding upon it, and was repudiated by the said Company; and the plaintiffs' said time, trouble, and expense were wholly thrown away, and it was impossible for the plaintiffs to earn anything under the said supposed agreement, as they otherwise might and would have done had the same been the agreement of the said Company.

The second count stated, that the plaintiffs being such brokers as in the first count mentioned, and the defendants representing themselves to be directors and acting on behalf of the said Company as in that count mentioned, and also representing that the said Company was ready and willing to sell certain ships belonging to the said Company, and was desirous of meeting with a purchaser, in consideration that the plaintiffs would agree with the said Company, through the defendants as representing it, to render their services as such brokers in endeavouring to find and introduce a purchaser for the said ships, upon the terms of being paid a commission of 5% per cent. upon the amount of the purchase-money if they were successful in finding and introducing a merchant who actually became a purchaser of the said ships, and of being paid nothing for their trouble if not so successful; \*and in [\*351 further consideration of the plaintiffs' finding and introducing to the defendants, as representing the said Company, a merchant who was desirous of purchasing the said ships, and of the plaintiffs' carrying on a negotiation between such merchant and the defendants, and inducing the said merchant to accept the terms and conditions of purchase required by the defendants on behalf of the said Company, and of the plaintiffs' procuring the said merchants to finally close and agree with the defendants as representing the said Company, upon the said terms and conditions, and to bind themselves with the defendants as representing the said Company, to purchase the said ships upon the said terms,—the defendants promised and warranted to and with the plaintiffs, that they the defendants had authority and power to make the said agreement between the said Company and the plaintiffs, and also to effect the said agreement for the said Company for the sale of the said ships: Averment, that the plaintiffs afterwards entered upon the said services, and introduced to the defendants certain merchants who were desirous of purchasing the said ships, and the plaintiffs carried on a negotiation between the defendants and the said merchants in order to bring the parties to an agreement upon the terms and conditions of purchase, and succeeded in inducing the said merchants to accept the terms and conditions required by the defendants, and the said merchants and the defendants on behalf of and as representing the said Company finally

closed and agreed upon the terms and conditions of the said purchase, and the said merchants bound themselves to purchase upon such terms and conditions, and to pay a large sum of money for the said ships, to wit, the sum of 60,000*l.*; and the plaintiffs performed all conditions precedent, and all times elapsed, and all matters and things were done \*352] and happened to entitle them to have the said promise and warranty on the part of the defendants performed and complied with: Yet the defendants broke their said promise and warranty, in this respect, that they had no power or authority to make the said agreement for the said Company with the plaintiffs as aforesaid; and also that they had no power or authority to make the said contract for the Company for the sale of the said ships to the said merchants so introduced by the plaintiffs as aforesaid: by reason whereof the plaintiffs had no agreement with the said Company for the payment to them of the said commission upon the terms aforesaid, nor was there, for the like reasons, any contract between the said Company and the said merchants for the purchase of the said ships, as there otherwise would have been; and by reason of the premises the plaintiffs had lost the benefit of the said contract, and had not become entitled to the said commission, as they otherwise would have been, and their trouble and labour and expense had all been thrown away and lost.

There was also a count for money payable by the defendants to the plaintiffs for work done and materials provided by the plaintiffs for the defendants at their request, and also for commission of right due and owing and by the defendants agreed to be paid by them to the plaintiffs for negotiating the sale of ships of the defendants.

The defendants pleaded,—first, to the first count, that they did not warrant as alleged,—secondly, to the second count, that they did not promise or warrant as therein alleged,—thirdly, to the first and second counts, that they were not guilty of any breach of warranty as in those counts respectively alleged,—fourthly, to the residue of the declaration, never indebted: whereupon issue was joined.

\*353] \*The cause was tried before Willes, J., at the sitting in London after last Trinity Term. The plaintiffs are ship-brokers carrying on business in Leadenhall Street, London, under the firm of Wilson, Barton & Slater. The defendants were six of the nine directors of a Company called The General Iron Screw Collier Company, Limited. The action was brought for (in the first count) an alleged breach of warranty by the defendants that they had authority on behalf of the Company to employ the plaintiffs as ship-brokers to negotiate a sale of certain ships belonging to the Company; and, in the second count, for an alleged breach of warranty by the defendants that they had authority to agree to sell the ships; and under the indebitatus count the plaintiffs claimed 3000*l.*, being a commission of 5 per cent. on 60,000*l.*, the sum at which they had found a purchaser for the twelve ships of the Company.

The General Iron Screw Collier Company was established in 1852, and was provisionally and afterwards completely registered under the Joint Stock Companies Act, 1854. The object for which the Company was formed, was, to build or purchase iron steam-vessels, to be engaged in the transport of coals or other merchandise. The capital was to be 250,000*l.*, divided into 50,000 shares of 5*l.* each. A deed of settlement

in the ordinary form was prepared and executed by the requisite number of shareholders, and duly registered; and thus the Company was incorporated in accordance with the statute 7 & 8 Vict. c. 110.

The clauses of the deed of settlement material to the present case were the following:—

Clause 3. "That the business of the Company is and shall be, to build or purchase and own or hire iron steam-vessels with the screw propeller or other means of propulsion, and to use or let upon hire the same for the purpose of the transport of the coals or other \*mer- [\*354 -  
chandise from any port or ports in the united kingdom of Great Britain and Ireland, or elsewhere, to any other port or ports in the united kingdom of Great Britain and Ireland, or elsewhere."

Clause 6. "No person except a person from time to time expressly authorized by these presents, or by a board, so to do, shall have any authority to enter into any contract so as to bind the Company thereby."

Clause 94. "The directors shall be intrusted with and exercise and perform the following powers and duties, to wit,—

"2. The building or purchasing or hiring of such steam-vessels as they see fit, with all requisite engines and apparatus.

"4. The repairing and renewal of the vessels, engines, and apparatus.

"5. The selling and letting to hire and chartering of the vessels.

"7. The general conduct and management of the business of the Company.

"15. The entering into contracts for the Company, and the altering, rescinding, or abandoning of the same, and the contracting on behalf of the Company of such debts and liabilities as may be necessary in transacting the business of the Company, including the accepting, endorsing, and making of such bills of exchange and promissory notes as may be requisite in the course of the business of the Company.

"32. The controlling, managing, and regulating in all other respects, except as by these presents otherwise provided, of all matters relating to the Company and the affairs thereof."

The dissolution of the Company (subject to the provisions of the Joint Stock Companies Act, 1856, 19 & 20 Vict. c. 47) was provided for by the following clauses:—

\*Clause 161. "That an absolute dissolution of the Company [\*355 shall be made only under the following circumstances, that is to say, if a resolution for that purpose shall be reduced into writing, and shall be twice read and put to the vote, and shall be carried each time by a majority of at least two-thirds in number of the shareholders present personally or by proxy, holding among them at least two-thirds of the shares of the Company, at an extraordinary general meeting,—and if such resolution shall be confirmed by a like majority at a subsequent extraordinary general meeting to be held after the expiration of fourteen days, but before the expiration of fourteen days next after the general meeting at which such first resolution shall have been passed,—then the Company shall be dissolved, and it is hereby declared to be dissolved accordingly, from the date of such second general only meeting, except for the purposes mentioned in the next following article, and without prejudice thereto."

Clause 162. "That, in case of a dissolution, the directors shall, with all convenient speed, and they are hereby empowered to call in, sell, dispose of, and convert into money all such parts of the estate and effects of the Company as shall not already consist of money; and a general account and valuation shall be made by the directors of the said estate, effects, and proceeds of such sale and conversion, which account and valuation shall be submitted to an extraordinary general meeting to be held for the purpose, and, when approved by such meeting, it shall be binding upon the shareholders: and, upon settling such final accounts, all the surplus estate and effects, if any, of the Company, shall be divided, ordered, and disposed of, after payment of all just demands upon the Company, among the shareholders, in proportion to their respective shares; provided always, that no shareholder who shall not \*356] put in his claim, and, if required, establish his title to the \*share of such surplus falling due to him, within two years after the extraordinary general meeting held for winding up the Company's affairs, shall be entitled to any share or interest therein, but the same shall be applied and divided as part of the surplus capital of the Company, for the benefit and among the then ascertained parties among whom the rest of the capital shall be distributable; provided always, that, notwithstanding such resolution for the dissolution of the Company having been passed as hereinbefore provided, these presents, and all the privileges, rights, and liabilities of the shareholders shall continue in full force until the affairs of the Company shall have been fully wound up, and the whole of the debts, credits, assets, and property of the Company paid, got in, realized, and divided as aforesaid, and for these purposes and until such time as aforesaid, the Company shall be and be deemed and taken to be still subsisting and undissolved, any such resolution as aforesaid and anything hereinbefore mentioned to the contrary notwithstanding."

At the beginning of 1858, it being found difficult to find advantageous employment for the Company's vessels, and the shareholders becoming dissatisfied, an extraordinary general meeting of the Company was held, at which it was resolved "that the directors be instructed to sell the vessels and realize the property of the Company with as little delay as is consistent with the interests of the shareholders, and that meanwhile the business be conducted as usual, but with due regard to the object of this resolution;" and a committee was appointed "to advise with the directors for the purpose of carrying out the above resolution."

In October, 1859, the plaintiffs applied to the directors proposing to assist them in the sale of their vessels, twelve in number; and, after \*357] considerable \*negotiation, and various offers had been made and rejected, a contract was ultimately made, through the plaintiffs' intervention, with one Capper, the secretary to the Victoria Dock Company, for the sale of the whole of the vessels to him for 60,000*l.*,—one of the terms of the bargain being that "a commission of 5*l.* per cent. upon the amount of purchase-money should be paid by the sellers to Messrs. Wilson, Barton & Slater (the plaintiffs), as the several instalments are discharged."

A draft contract was prepared and was submitted to Mr. Capper and the other parties interested in the purchase, and to their solicitors. The latter objected that the directors had no power to sell the ships

without the consent of the shareholders, inasmuch as the sale of the whole of the fleet was virtually a dissolution of the Company. A discussion took place with the board of directors as to this difficulty. The directors expressed their willingness to enter into the contract, but the proposed purchasers declined to do so, unless the directors would bind themselves to obtain the consent of the shareholders. This the directors would not undertake to do.

On the 21st of December, 1859, an extraordinary general meeting of the shareholders was held, when a resolution was moved, "that it is expedient that the offer for the purchase of the Company's vessels referred to in the directors' report be accepted." The assent of a sufficient number of shareholders, pursuant to the 161st clause of the Company's deed, not having been obtained, the resolution was negatived.

The plaintiffs thereupon demanded 3000*l.* for their commission for procuring a purchaser; and, their demand not being complied with, brought this action against the directors.

On the part of the defendants, it was submitted that \*the [\*358 action was not maintainable; that there was no complete contract entered into between the directors and Mr. Capper, but all rested in proposal, which ultimately went off, and therefore no commission was earned (*Broad v. Thomas*, 4 Moore & P. 732, 7 Bingh. 99 (E. C. L. R. vol. 20), 4 C. & P. 338 (E. C. L. R. vol. 19)); that there was no warranty by the defendants that they had authority to sell,—the fact of authority being no more in their knowledge than in that of the plaintiffs, the deed of settlement being registered and accessible to all the world; that, if any one was liable at all, it would be the Company, and not the directors; (a) that there was no evidence to sustain the breach,—the objection of the purchasers to complete the bargain being unfounded, inasmuch as the directors had ample authority under the deed regulating the affairs of the Company to sell their ships as they might think best for the interests of the shareholders; and that the sale even of the whole of their fleet would not necessarily be a dissolution of the Company, for they might well carry on their business without being possessed of a single vessel of their own, and the 161st clause only coming into operation in the event of a resolution being come to by the shareholders finally to dissolve the Company.

The learned Judge reserved to the defendants leave to move to enter a verdict for them upon these points, in the event of the jury finding for the plaintiffs: and, as to the damages, he told the jury that, although the plaintiffs were not absolutely entitled to recover the 3000*l.* as commission, it was for them to say whether there was any reason why they should not recover that sum, if they (the jury) thought they had lost it by the wrongful act of the defendants,—rather intimating that he should be surprised if the jury gave less.

\*The jury having found for the plaintiff, damages 3000*l.*,

*Montagu Smith*, Q. C., in Michaelmas Term last, obtained a [\*359 rule nisi to enter a verdict for the defendants, pursuant to the leave reserved, on the grounds "that the contracts and warranties alleged in the first and second counts of the declaration were not proved; that the evidence did not support such counts, either as regards the consideration or the promises alleged; that the breaches in these counts were

(a) An action had originally been brought against the Company, but afterwards discontinued.

not proved; that the defendants had authority for the instructions given to the plaintiffs; that the defendants had authority to sell the ships; and that there was no evidence of the employment of the plaintiffs by the defendants, to support the common counts;" or for a new trial, on the grounds "that, on the question of damages, the Judge should have directed the jury as to the principle on which damages should be assessed; and that the damages were excessive, and not supported by the evidence."

*Bovill*, Q. C., *Lush*, Q. C., and *Watkin Williams*, showed cause.—The defendants, when they employed the plaintiffs to procure a purchaser for their fleet, professed to have authority on behalf of the Company to sell, not a word being said about the necessity of obtaining the assent of the shareholders. The defendants, relying upon that profession, procured a purchaser; but the contract could not be carried into effect, because the shareholders did not concur. In *Collen v. Wright*, 7 Ellis & B. 301 (E. C. L. R. vol. 90), W. signed a written agreement, describing himself in the signature as agent to G., whereby he agreed with C. that a lease should be granted to C. of a farm belonging to G. \*360] \*the agreement: in fact W. had no such authority. G. refusing to grant the lease, C. filed a bill against G. for specific performance; and, after G. had put in his answer, denying W.'s authority, C. gave notice to W. of the suit and ground of defence, and that C. would proceed with the suit at W.'s expense, unless W. gave him notice not further to proceed; and that C. would bring an action against W. for damages in the event either of the bill being dismissed on the ground of defence set up, or of W. requiring C. not further to proceed. W. answered, repudiating his liability to C. The bill was dismissed on the ground of defence set up. On a special case setting out the above circumstances, with liberty to the Court to draw inferences of fact,—it was held that C. was entitled to maintain an action against W. as for breach of a promise that W. had the authority. "There can be no doubt," said Lord Campbell, "that the testator asserted that he had authority to let the property on the terms to which he agreed. That is a promise and a warranty. Might he not then have been sued on the warranty, although he believed it to be true? If he induced the plaintiff to act upon it, he was bound. It is broken, since the testator had not authority. A lawful promise having been broken, why should not there be an action upon it, although there has been no bad faith? I should clearly be of opinion that such action lay, even without the authority of *Randell v. Trimen*, 18 C. B. 786 (E. C. L. R. vol. 86). But that case is an express authority." And that decision was affirmed by the Exchequer Chamber (8 Ellis & B. 647 (E. C. L. R. vol. 92)), Cockburn, C. J., dissenting. But it will be contended that the directors had power to enter into the contract in question, and that that is shown by the deed of settlement,—particularly by the 94th clause: and, further, it will be contended, that, if the deed did not give them power, the plaintiffs, who like all the \*361] rest of \*the public had a right of access to it, must be presumed to have been cognisant of its contents. This contract, however, was not an exercise of the powers of the directors under the 94th clause: it was not a sale in the ordinary course of the conduct of the business of the Company; but rather a dissolution of the Company under clauses 161 and 162, without the required formalities. In the one case, the

directors would have power, if their fleet were too large, to dispose of one or more of the vessels; but the Company could not be dissolved without pursuing the course prescribed by those clauses: *Ernest v. Nicholls*, 6 House of Lords Cases 401. Although every person dealing with a joint stock Company is presumed to be aware of the provisions of the deed of settlement under which it is constituted, he is not bound to be cognisant of all the internal arrangements of the Company: *Smith v. The Hull Glass Company*, 11 C. B. 897 (E. C. L. R. vol. 73); *The Royal British Bank v. Turquand*, 6 Ellis & B. 327 (E. C. L. R. vol. 80); *Agar v. The Athenæum Life Assurance Society*, 2 C. B. N. S. 725 (E. C. L. R. vol. 89); *The Athenæum Life Insurance Company v. Pooley*, 28 Law J., Ch. 119; *Ellis v. Colman*, 25 Beavan 662; *The Prince of Wales Assurance Company v. Harding*, 1 Ellis, B. & E. 183, 221 (E. C. L. R. vol. 96). In *The Royal British Bank v. Turquand*, Jervis, C. J., in delivering the judgment of the Court of error, says: "We may now take for granted that the dealings with these Companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and the deed of settlement. But they are not bound to do more. And the party here, on reading the deed of settlement, would find, not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution \*authorizing that which on the face of the document [\*362 appeared to be legitimately done." And in *The Prince of Wales Assurance Company v. Harding*, Lord Campbell, referring to *Smith v. The Hull Glass Company*, observes,—“Maule, J., there says, that, although persons who contract with directors acting under stat. 7 & 8 Vict. c. 110, must be taken to be cognisant of the extent of the authority conferred upon them, ‘it by no means follows that they are to be taken to be cognisant of all the proceedings of the board of directors.’” Applying those principles here, the plaintiffs, receiving from the directors of this Company instructions to offer their vessels for sale, had a right to suppose that the directors had armed themselves with the authority of the shareholders to carry the contract into effect. That there was a complete agreement come to between Mr. Capper and the directors, is clear from the cases of *Fowle v. Freeman*, 9 Ves. 351; *Ridgway v. Wharton*, 6 House of Lords Cases 238, 264, 287; *Barker v. Allan*, 5 Harl. & N. 61.† Then, assuming that the action is maintainable, what damages are the plaintiffs entitled to recover? The failure in carrying out the contract having occurred through the fact that the directors had not the authority they professed to have, the true measure of damages, it is submitted, is, the amount the plaintiffs would have received if the contract had been carried out: per Willes, J., in *Prickett v. Badger*, 1 C. B. N. S. 296 (E. C. L. R. vol. 87); *Lockwood v. Levick*, 1 C. B. N. S. 603 (E. C. L. R. vol. 98).

*Montagu Smith*, Q. C., *Honyman*, and *F. M. White*, in support of the rule, were not called upon. *Cur. adv. vult.*

ERLE, C. J.—The plaintiffs sue for a breach of \*contract, [\*363 and the question on which we decide is, whether the contract, if made, was broken. The defendants are the directors of a limited Company. The Company made a contract with Mr. Capper to sell to him twelve ships. The contract was made by the plaintiffs, Messrs. Wilson,

on behalf of the buyer; and the defendants were the directors who according to the deed of the Company acted for the Company. The sale went off on the part of Mr. Capper, because the twelve ships were the whole of the Company's fleet, and the directors, when they contracted to sell the ships, had the purpose of proceeding to dissolve the Company and wind up, being of opinion that it was for the interest of all concerned so to do. Then, had the directors authority? By the deed, s. 94, they were authorized to buy, sell, or charter ships. By s. 161, the mode of dissolution is provided for. And by s. 162, in case of dissolution, the directors must sell all the stock, and wind up. Mr. Capper objected that the general authority to sell under s. 94 did not authorize the directors to sell all the ships, if they had the purpose of dissolving and winding up; but a sale for that purpose was only authorized after a dissolution; and, as there was no dissolution, they had no authority; and, as they made the contract to sell, they must be taken to have acted as agents for themselves and other shareholders, and to have contracted with the vendee that they had the authority of their principals so to contract, and to have broken that contract, and so to have made themselves liable to the plaintiffs, the agents of Capper, for the commission which they would have received on completion of the sale.

I am of opinion that the plaintiffs fail, because, as to the contract between the Company and Mr. Capper, I think it was a contract binding on the Company, being made under the general authority given to \*364] the directors to sell their ships. The authority extended to sell \*some ships, and, if some, there is no rule of law limiting it to less than twelve, or to a part only. The directors have the duty to protect the general interests of the shareholders according to their judgment. If the ships could only be navigated at a loss, they may let, cease to navigate, or lay them up, or, if it would be more profitable, sell. If they sold, they might keep the proceeds to be re-invested if the Company did not choose to dissolve, or to be distributed in winding up if they did. The purpose of proceeding to dissolution was lawful, and it might be prudent if their continuance to trade would be a loss. I therefore think the general authority extended to validate the sale.

There are other points for the defendants which it is not necessary to go into, as I decide on this question for them.

WILLES, J.—I am entirely of the same opinion, and on the ground on which my Lord has rested his judgment. There can be no doubt that the directors have in express terms, by the regulations which were put in on the part of the defendants, the power to sell the vessels of the Company; and that power is accompanied by another, to be found in the 32d article of clause 94, viz., "the controlling, managing, and regulating in all other respects, except as by these presents otherwise provided, of all matters relating to the Company, and the affairs thereof." They have power in terms, by art. 5, to sell the vessels belonging to the Company. They then have in the same clause of the regulations powers given not affecting that authority; and then they have power conferred on them in the most sweeping terms, to deal with all other matters in which the Company are interested. Now, there could be no doubt that the sale was *primâ facie* within the authority of the directors:

but it is said that that authority is \*taken away by the effect of the 161st and 162d clauses of the regulations, which provide for [\*365 the case of a dissolution of the Company; and it is said that those provisions require, as they unquestionably do, the dissolution of the Company to take place with the assent of a certain proportion in number and value of the shareholders, and that the assent of that proportion of the shareholders had not been obtained; and it is further said that the act which the directors did, and which otherwise would have been valid,—the selling or endeavouring to sell the vessels,—became invalid by reason of their intention to contravene those provisions of the regulations which point to a dissolution in a special way, by effecting a dissolution and a winding up in some other and irregular way. Then, for the purpose of establishing that, there was put in at the trial the report of the directors; and it is said that that indicates an intention on their part to wind up the Company, and without such a resolution as I have adverted to as necessary for that purpose, and, as incidental to the winding up, to sell the whole of the vessels belonging to the Company, and to proceed to distribute the proceeds. Now, I apprehend, when that report of the directors is looked at, it bears no such construction. It is unquestionably to be inferred from the report that the directors contemplated the winding up of the Company as being the most beneficial course that could be taken for the shareholders. There can be no doubt that they contemplated the turning the vessels into money, as being an act which was beneficial to the shareholders, and which would be beneficial to them if the winding up took effect. There is nothing in the case from beginning to the end to show that the act of selling the vessels was an act prejudicial to the shareholders, assuming that that winding up had not taken place. I am unable to find in the \*evidence from beginning to end anything to show [\*366 that the act of the directors in selling these twelve vessels for 60,000*l.* was an act, well in itself, taken apart from the consideration of winding up, which could be prejudicial. I do not find that the vessels were sold at an under value. I do find that they were sold at the price which was put upon them by the directors. The plaintiffs obtained a purchaser at the price which the directors themselves desired, of course acting for their own interests as well as for the interest of the other members of the Company, to put upon them. The question, therefore, is reduced to this, whether the intention in the minds of the directors, and the desire which they had to wind up the Company, makes that an unauthorized act which otherwise would have been an authorized act. I apprehend that that question may be very readily answered. There is nothing to answer it in the regulations. We must look, therefore, to the general rules of law. Now, I apprehend it is a rule, that the validity of a person's acts is to be decided upon, not by what he says as indicating the intentions that are passing in his mind at the time the act is done, but by the authority which he has; and that authority, as I have already shown, does in this case in terms warrant the act. Then I apprehend there is another principle of law which applies, and which makes this transaction valid,—that the Court is not to assume that parties propose to carry their intentions into effect by illegal means, if their intentions can be carried into effect by legal means. There is no presumption that the directors did in this case intend, of their own

heads, and without consulting the Company, to effect a winding up. The Court ought rather to presume that the directors would have been well advised, and would have acted according to their duty; and, on \*367] obtaining the 60,000*l.*, instead of proceeding \*forthwith to make a winding up of their own authority, they would have held a meeting, and taken the opinion of the shareholders, as they were bound to do, on the subject. If the opinion of the shareholders was in favour of the winding up, the winding up would take place; and if it was not in favour of the winding up, there would be 60,000*l.* to the credit of the Company, which might be used for the purpose of carrying on its concerns: and, looking at the account which is annexed to the report, I find other sums standing under similar circumstances to the credit of the Company,—smaller sums, no doubt, but still sums which would have been standing on the same footing as the 60,000*l.* would have stood on, if it had been paid and carried to the account of the Company at their bankers'. It appears to me that we should be violating both those principles of law, if we came to the conclusion that the intention of the directors affected the validity of their acts as regards third persons; or if we held that the directors must necessarily be presumed to have contemplated carrying their intention into effect in an unauthorized way, when they might have done so in an authorized way, and might not have done so at all if they had not afterwards obtained the requisite authority. This is a question of business. We must look at it, therefore, of course within the limits of the law, but still look at it in a practical point of view. The question might be easily answered in that point of view by putting a case. I will assume the very case which has arisen here, according to the statement in the resolution. I will assume that the affairs of the Company had fallen into what I may call a questionable state; that there had been discussions amongst the shareholders on the subject; and that the directors had been requested by a resolution of the majority to dispose of the property consistently with the \*368] interests of \*the shareholders; that the affairs of the Company were in such a state that it required the exercise of considerable discretion to determine whether the business should be carried on at a loss or at a risk, or whether the property should be disposed of, so that it might be in the power of all concerned to come to some fresh resolutions as to how their affairs should for the future be conducted. And I will assume, that, at a period when delay might take place in summoning a meeting of the shareholders for the purpose of agreeing to a dissolution, an opportunity was afforded for selling the vessels at a sum which it could not be hoped would readily be obtained for them at a subsequent period. I apprehend, under those circumstances, it was clearly the duty, as it would be the interest, of the directors to realize the vessels, and to convert them into money at that favourable price, and to retain the money in their hands until the opinion of the shareholders at large had been taken as to what should be done; and I am not aware that anything more has been done here than that. I apprehend that there has been no breach of duty on the part of the directors. I do not see that they have done anything which as trustees of the property of the Company they were not fully justified in doing. I see they have pursued the authority in the deed; and I apprehend the averment in the plaintiffs' declaration, that they were without authority.

to employ them for the purpose for which they employed them, has failed; and that the verdict ought to be entered for the defendants on the issues raised on such authority, and also, of course, upon the general plea to the common count. That would follow from the statement that I have endeavoured to make of the law applicable to the subject. On these grounds, therefore, it appears to me that the rule ought to be made absolute.

Rule absolute.

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**\*LEADER and Another v. RHYS. May 2. [\*369**

In an action for the hire of two pianos, with a count in detinue for the pianos themselves, the defendant paid into Court the amount due for the hire, and (after the commencement of the action) delivered up the pianos. At the trial, the jury found that the value of the pianos was 130*l.*, and gave a verdict for the plaintiff for 1*s.* damages on the count in detinue:—

Held, that the plaintiff was entitled to costs, under the 14 & 15 Vict. c. 54, s. 4, the cause of action, at the time of its commencement, not being one for which a plaint could have been entered in the County Court.

THIS was an action for goods sold and delivered and for the hire of goods, with a count in detinue for two pianofortes. The writ was issued on the 10th of December, 1860: on the 30th, the pianofortes were returned; and on the 2d of January, 1861, the defendant paid into Court 6*l.* 10*s.* 6*d.*, a sum sufficient for the hire of the pianofortes.

At the trial before Byles, J., at the sittings at Westminster after last term, the jury found that the value of the pianofortes was 130*l.*; and they returned a verdict for the plaintiff with 1*s.* damages for their detention. The learned Judge was asked to certify to give the plaintiffs costs; but no particular statute was referred to. He declined to certify.

*Parry*, Serjt. (with whom was *Lucius Kelly*), now moved for an order that the plaintiff recover his costs, under the 4th section of the 15 & 16 Vict. c. 54. That section repeals the 13th section of the 13 & 14 Vict. c. 61, and enacts, that, “in any action in which the plaintiff shall not be entitled to recover his costs by reason of the provisions of the 11th section of such act,(a) whether there be a verdict in such action or \*not, if the plaintiff shall make it appear to the satisfaction of [\*370 the Court in which such action was brought, or to the satisfaction of a Judge at Chambers, upon summons, that such action was brought

(a) Which enacts, “that, if in any action commenced after the passing of this Act in any of Her Majesty’s superior Courts of record, in covenant, debt, detinue, or assumpsit, not being an action for breach of promise of marriage, the plaintiff shall recover a sum not exceeding 20*l.*, or if, in any action commenced after the passing of this Act in any of Her Majesty’s superior Courts of record, in trespass, trover, or case, not being an action for malicious prosecution, or for libel, or for slander, or for criminal conversation, or for seduction, the plaintiff shall recover a sum not exceeding 5*l.*, the plaintiff shall have judgment to recover such sum only, and no costs, except in the cases hereinafter [s. 13] provided, and except in the case of a judgment by default;† and it shall not be necessary to enter any suggestion on the record to deprive such plaintiff of costs, nor shall any such plaintiff be entitled to costs by reason of any privilege as an attorney or officer of such Court, or otherwise.”

† See the 19 & 20 Vict. c. 108, s. 30, which enacts, that, “where an action of contract is brought in one of Her Majesty’s superior Courts of record, to recover a sum not exceeding 20*l.*, and the defendant in the action suffers judgment by default, the plaintiff shall recover no costs, unless, upon an application to such Court, or to a Judge of one of the superior Courts, such Court or Judge shall otherwise direct.”

for a cause in which concurrent jurisdiction is given to the superior Courts by the 128th section of the 9 & 10 Vict. c. 95, *or for which no plaint could have been entered in any such County Courts*, or that such action was removed from a County Court by certiorari, or *that there was sufficient reason for bringing such action in the Court in which such action was brought*,—then and in any of such cases, the Court in which such action is brought, or the said Judge at Chambers, shall thereupon, by rule or order, direct that the plaintiff shall recover his costs that he would have had if the before-mentioned Act of the 13 & 14 Vict. c. 61, had not been passed.” This was a cause of action for which no plaint could have been entered in the County Court, the value of the articles sought to be recovered being, as found by the jury, 130*l.*; whereas, the jurisdiction of the County Court in detinue is limited to 50*l.*: 13 & 14 Vict. c. 61, s. 1. Further, it is submitted that there was sufficient reason for bringing the action into the superior Court. [ERLE, C. J.—\*371] That is a matter of discretion: \*we should be very much guided as to that by the opinion of the Judge who tried the cause; and he is against you.] The question is not, what was the state of things at the time of the trial, but at the time of the commencement of the action. At the time the plaintiff commenced his action, he could not have sued in the County Court: it cannot, therefore, be said to have been unreasonable for him to bring his action here. [BYLES, J.—On the 2d of January, you had got back your pianos, and all you were entitled to for the hire of them, and all the costs except the costs of the issue on non detinet.] We could not have got those without going on. The defendant should have paid 1*s.* into Court on the count in detinue, as was done in *Crossfield v. Such*, 8 Exch. 159.† In *Taylor v. Addyman*, 13 C. B. 309 (E. C. L. R. vol. 76), Jervis, C. J., says: “It appears to me to be plain that the Act [9 & 10 Vict. c. 95] intended to include detinue in ‘all pleas of personal actions,’ where the debt or damage does not exceed the amount limited. The answer to the argument, that, by putting a value below 50*l.*, a plaintiff might recover in detinue a chattel worth 100*l.* or 1000*l.*, is, that the moment it appears that the value exceeds 50*l.*, the jurisdiction of the County Court is at end. It is not the capricious value put upon the thing by either party, but the decision of the Judge or the jury, that ascertains whether the case is within the jurisdiction or not.

*Collier*, Q. C., showed cause in the first instance.—The acceptance by the plaintiff of the whole hire for the pianos amounted to an admission that the defendant was not a wrongdoer. The learned Judge might have certified under the 34th section of the Common Law Procedure Act, 1860, 23 & 24 Vict. c. 82.(a) [BYLES, \*J.—That question \*372] cannot arise now.] Upon this verdict for 1*s.*, the plaintiffs clearly cannot be entitled to costs. If the verdict had been in the usual

(a) Which enacts, that, “when the plaintiff in any action for an alleged wrong in any of the superior Courts recovers by the verdict of a jury less than 5*l.*, he shall not be entitled to recover or obtain from the defendant any costs whatever in respect of such verdict, whether given upon any issue or issues tried, or judgment passed by default, in case the Judge or presiding officer before whom such verdict is obtained shall immediately afterwards certify on the back of the record, or on the writ of trial or writ of inquiry, that the action was not really brought to try a right besides the mere right to recover damages, and that the trespass or grievance in respect of which the action was brought was not wilful and malicious, and that the action was not fit to be brought.”

form, for the value of the pianos, subject to be reduced to 1s. upon their being given up to the plaintiff, the case would have been different. The plaintiffs have recovered 1s. : the verdict has ascertained that they are entitled to 1s. and no more. The verdict alone can be the test of the plaintiffs' rights. They were not bound to sue in detinue.

ERLE, C. J.—It appears to me that the plaintiffs are entitled to demand our judgment on that part of the 4th section of the 15 & 16 Vict. c. 54 which provides, that, in any action in which the plaintiff shall not be entitled to recover his costs by reason of the provisions of the 11th section of the 13 & 14 Vict. c. 61, if the plaintiff shall make it appear to the satisfaction of the Court in which such action is brought, that such action was brought for a cause for which no plaint could have been entered in any County Court, the Court in which such action is brought shall thereupon, by rule or order, direct that the plaintiff shall recover his costs that he would have had if the before-mentioned Act of the 13 & 14 Vict. c. 61 had not been passed. Now, no \*plaint in detinue can be brought in the County Court where the value of the chattel detained exceeds 50*l*. Here, the value of the pianofortes was found by the jury to be 130*l*., consequently the plaintiff has brought himself within the exception. The case of *Taylor v. Addyman* has decided that the value of the chattel, as ascertained by the Court or the jury, is to bound the jurisdiction of the County Court. Such being the language of the statute, and such the decision of this Court, I feel bound to give my adhesion to them, and to hold that the plaintiff is entitled to have this rule made absolute. [\*373]

WILLES, J.—I am of the same opinion. The question is, whether the plaintiff had a right to bring the action in this Court at the time it was brought. I think it will be found that the fact of delivery up of the chattels in respect of which the action is brought, would appear upon the record as a reason why the verdict passed for 1*l*. only. There are certainly precedents for that, where, in detinue, the thing detained has been destroyed before the commencement of the action, or has been delivered up after action brought.<sup>(a)</sup> Here, inasmuch as the pianos for the detention of which the action was brought were of the value of 130*l*., the action could not have been brought in the \*County Court, that sum far exceeding the limit of the jurisdiction of that Court. [\*374]

BYLES, J.—I am entirely of the same opinion. It seems to me to be perfectly clear, that, at the time they brought this action, the plaintiffs went for the value of the pianos and damages for their detention, which value the jury have found to be 130*l*.,—a sum for which a plaint could not have been entered in the County Court. That being so, the statute (15 & 16 Vict. c. 54, s. 4) gives them costs. My attention was not called to the statute, nor to any authority, when I was asked to certify.

KEATING, J.—I also think the plaintiffs are entitled to costs. This is not a case of a claim for an exaggerated value, with a view to give

<sup>(a)</sup> See *Williams v. Archer*, 5 C. B. 318 (E. C. L. R. vol. 57). There, in detinue for railway scrip which had been delivered up to the plaintiff after action brought, under a Judge's order,—it was held, that, inasmuch as the scrip had already been redelivered, the verdict and judgment were properly confined to an assessment of damages for the detention,—by analogy to the case of the redelivery of charters being rendered impossible by reason of their having been burnt.

And see the old authorities referred to in the notes by Manning, Serjt., to that case.

jurisdiction to the superior Court: the value of the chattels was ascertained by the jury to be 130*l*. The plaintiff, therefore, could not have entered a plaint in the County Court; for, the moment it appeared that the value for which the plaintiff was going exceeded 50*l*., that Court could have proceeded no further. Rule absolute.

**\*375] \*THE THAMES IRON WORKS AND SHIP-BUILDING COMPANY v. THE ROYAL MAIL STEAM-PACKET COMPANY. April 27.**

Particulars of the parts of the plaintiff's claim in respect of which money is paid into Court, will not be ordered, except under very special circumstances.

The Court refused to order such particulars to be given in an action for extras and alterations upon a ship-building contract.

THIS was an action to recover the balance of the price of two steam-vessels built by the plaintiffs for the defendants under a contract.

The second count of the declaration set out the contract, under which the defendants agreed to pay 69,500*l*. for the two vessels, by certain instalments. There was also a provision for extras and alterations, to be ordered in a manner specified.

The sixth count alleged that certain extras had been ordered, and had been completed in accordance with the contract, alleging non-payment of the price by the defendants.

The declaration also contained the common money counts.

The defendants pleaded twenty-six pleas,—the twenty-fifth and twenty-sixth being pleas of payment into Court, pleaded to the sixth and to the common counts respectively; the former of the sum of 45*l*. 11*s*. 6*d*., the balance of the contract price; the latter of 1454*l*. 8*s*. 6*d*., to the claim for extras.

The plaintiffs applied to Williams, J., at Chambers, for an order for particulars of the parts of the plaintiffs' claim to which the above sums were paid in,—relying on *Baxendale v. The Great Western Railway Company*, 6 Hurlst. & N. 95,† where, in an action against the defendants as carriers, the declaration in one count alleged the loss and damage of a variety of goods which the defendants undertook to carry for the plaintiff to numerous places at different times; and, the plaintiff having delivered particulars of his claim, and the defendants having pleaded \*376] payment into Court \*of a certain sum in satisfaction thereof generally, the Court of Exchequer ordered the defendants to deliver an account of the particular items of the plaintiff's demand in respect of which the money was paid in. The learned Judge, however, declined to make the order, but referred the parties to the Court.

*V. Harcourt* now moved accordingly.

*Holland* showed cause in the first instance.—The application is entirely without precedent, although pleas of payment into Court have been pleaded ever since the time of *Levinz*. In *Ireland v. Thompson*, 4 N. C. 716 (E. C. L. R. vol. 33), 6 Scott 601, the Court made a rule absolute to discharge the rule for pleading several matters, unless the defendant would deliver particulars of the alleged payments; but there the plaintiff swore that no such payment had been made, and that he

could not safely go to trial without the particulars. But, in the subsequent case of *Phipps v. Sothern*, 8 Dowl. P. C. 208, the Court of Exchequer refused to compel the defendant to give particulars. In support of the application, it was there contended that the case of a plea of payment was analogous to that of a plea of set-off, and that the same reasons might be urged for the delivery of particulars in the one case as in the other. But Parke, B., said,—“There is no such analogy as that contended for. A plea of set-off is in effect a cross-action, and the plaintiff has a right to know what claim the defendant has against him: but here you seek to make the defendant disclose the evidence in support of his answer to the action.” With reference to these authorities, it is said in Archbold’s Practice, 10th edit. 139:—“Where the defendant pleads payment, the plaintiff, according to the decision of the Court of Common Pleas, may obtain particulars of the [\*377] \*payments relied on, on an affidavit stating that he cannot safely go to trial without them (*Ireland v. Thompson*). But the Court of Exchequer, in a later case (*Phipps v. Sothern*), refused to grant such particulars: and it is now the practice not to grant them.” The plea of payment into Court is one which is especially in favour of the defendant. The plaintiffs know what extra work has been done, and the precise value of each item: the defendants can know nothing about it: all they can do, is to get the extras valued, and pay in a sum which they are advised will suffice to cover them: they do not pay in with reference to each particular item; if, therefore, they are compelled to furnish the particulars required, the consequence will follow that is pointed out by Lord Abinger in *Jourdain v. Johnson*, 2 C. M. & R. 564, 569,† and by Bramwell, B., in *Baxendale v. The Great Western Railway Company*. [BYLES, J.—They would fail in respect of all deficiencies, and yet would derive no advantage from their surpluses.] Precisely so. Set-off is provided for by a special rule: there is none as to payment into Court.

*Harcourt*, in support of the rule.—Although Bramwell, B., in *Baxendale v. The Great Western Railway Company*, intimated some doubt, he did not dissent from the decision the Court came to. The course adopted by the Court of Exchequer in that case is a very reasonable one: and it would appear from what fell from Martin, B., not an unusual one. By paying money into Court, the defendant admits that something is due. [ERLE, C. J.—Payment into Court is not always an admission that something is justly due: it is often done for the mere purpose of buying off \*litigation.(a)] In patent cases, notices of objections [\*378] are required with great particularity. So, of interrogatories. And, indeed, the whole course of modern legislation and modern practice, is, to give parties all reasonable information beforehand as to what it is they are to go down to try.

ERLE, C. J.—This is a motion for a rule calling upon the defendants to furnish particulars of the items in respect of which they have paid money into Court under one count of the declaration,—a count for extras and alterations in the fulfilment of a contract for the building of certain ships. The defendants have paid into Court 1454*l.* 8*s.* 6*d.*; and the plaintiffs are desirous of knowing as to what extras and alterations the defendants admit themselves to be liable for. I am of opinion that

(a) See *Fischer v. Aide*, 3 M. & W. 486:† and see *Schreger v. Carden*, 11 C. B. 851 (E. C. L. R. vol. 73), and *Perrin v. The Monmouthshire Railway and Canal Company*, 11 C. B. 855.

the rule ought not to be granted: As far as my experience goes,—and it extends back a great many years,—it has not been the practice of the Courts to order a defendant to give particulars of money paid in on a declaration comprising several causes of action, but not several actions. It is so laid down in the books of practice: and the observations of Lord Abinger in *Jourdain v. Johnson*, 2 C. M. & R. 564,† appear to me to be founded in reason. In *Baxendale v. The Great Western Railway Company*, 6 Hurlst. & N. 94,† it seems that two members of the Court thought that under the particular circumstances of that case the particulars should be given; and the decision passed with the hesitating assent of some of the Judges, as an exceptional case. I entirely dissent from the expediency of the rule as suggested by Mr. *Harcourt*. The \*379] plaintiff, when he brings his \*action, ought to see that he has the means of proving his demand. Courts of law are too frequently resorted to by parties who take the chance of being able to prove something, or of the defendant being induced to pay something into Court, assuming that the plaintiff must have some cause of action. According to my experience as barrister and as Judge, money is often paid into Court in order to avoid the misfortune and annoyance of litigation, with all its attendant uncertainties and cost, and to purchase peace. That is peculiarly the case in actions of the description now under consideration: for, in such a case, it is almost impossible for the defendant to foresee on what suggestion the charge for extras and alterations is based: but, inasmuch as there may be proof against him, he pays into Court a sum exceeding the amount to which he anticipates that that proof will go. The plaintiff, on the other hand, ought to know with reasonable certainty what he can prove. If he is not prepared with proof that more is due to him than the sum paid in, he should accept what the defendant offers. There is no injustice in that: whereas, if we order the defendant to give particulars of the several parts of the plaintiff's claim in respect of which he pays the money, some unforeseen proof may turn up to enhance the value of some items, and so the defendant's payment may fall short as to these, without giving him the corresponding advantage as to those items in respect of which he has paid more than the jury may find due. *Fischer v. Aide*, 3 M. & W. 486,† was a remarkable case: there, there was a special count upon an agreement whereby the defendant engaged the plaintiff as courier for five months certain at ten guineas a month, and agreed, in case she discharged him before the end of the five months, to pay him the fifty guineas and his expenses back \*380] to Paris or England; and the count, after \*averring that the plaintiff served the defendant two months, and was ready and willing to serve for the remainder of the five months, alleged as a breach that the defendant refused to continue him in her service, and dismissed him before the end of the five months, and refused to pay him the fifty guineas, or any sum towards his expenses back. There was also a count for fifty guineas as the defendant's hired servant: and there was, amongst others, a plea that the plaintiff was dismissed for improper conduct, and a general plea, in the form given by the new rules, of payment into Court of 34l. 18s., upon the whole declaration. At the trial, it having been proved that the plaintiff had been guilty of very gross misconduct, the jury were desirous of finding for the defendant: but, for a technical reason, the Court was obliged to enter a

verdict for the plaintiff for nominal damages. That was one example of an unsuccessful attempt to purchase peace by paying money into Court. If we were to make this rule absolute, I think we should very much thwart an institution designed for the benefit of defendants.

BYLES, J.—I am of the same opinion. The power of paying money into Court is a great boon to defendants, and ought not to be taken away or invaded without sufficient cause. There is no precedent either in this Court or in the Court of Queen's Bench for the course we are asked to take in this case, although the practice of paying money into Court has prevailed for at least a hundred and fifty years. The case of *Baxendale v. The Great Western Railway Company*, in the Exchequer, occurred under very remarkable circumstances; and one of the learned barons gave his assent very reluctantly, and only on the ground that the effect of refusing it would be to compel the plaintiff to bring twenty-six actions instead of one. There is, however, \*nothing [\*381 in the present case to take it out of the ordinary rule. That which weighs with me is, that, to allow the rule here asked, would be substantially depriving the defendants of the benefit of their payment into Court; for, if the particulars were ordered, and a shilling too little were appropriated to one item, there must be a verdict against the defendants; because they could not claim the benefit of any excess as to other items. I am, therefore, clearly of opinion that there is no ground whatever for the rule prayed in this or in any similar case.

WILLES, J., and KEATING, J., were engaged in the Divorce Court.  
Rule refused.

### WALKER v. CLYDE, Clerk, and WREN. *April 25.*

A. agreed to build an organ for B. and to fix it in the parish church of C. for 768*l.* to be paid by certain yearly instalments. The agreement then provided, that, "in the event of the said organ being completed and erected as aforesaid, and the said sum of 768*l.* or any part thereof not being paid at the time or times thereinbefore mentioned, then it was thereby declared and agreed that the whole sum or balance, with the interest then due thereon, should become due and payable to Walker, and might be sued for and recovered accordingly: and in the mean time, and until the said balance and interest should be paid and discharged, Walker should have a lien on the said organ; and, in default of any or either of such payments as aforesaid at the time or times thereinbefore mentioned, Walker might either dispose of or remove the said organ as he might think proper:"—

Held, that the property in the organ remained in A. until the instalments were paid.

The instalments being unpaid, A. demanded the organ of the vicar of C. and the churchwardens. The vicar kept the church door locked, and refused to allow the organ to be removed, claiming a lien upon it. The churchwardens did nothing:—Held, that the vicar was liable in trover, and not the churchwardens.

Scoble, that the absence of a faculty for the removal of the organ was no answer to the plaintiff's claim.

THIS was an action against the vicar and the churchwarden of the parish of Bradworthy, in the county of Devon, for the detention of an organ the property of the plaintiff.

\*The defendants severally pleaded not guilty, non detinet, [\*382 and not possessed.

The cause was tried before Willes, J., at the sittings in London after last Michaelmas Term. It appeared, that, in 1859, one Francis Edward Lees, being desirous of placing an organ in the parish church of

Bradworthy, with the concurrence of the vicar and the parishioners, entered into the following agreement with the then churchwardens:—

“Articles of agreement entered into the 3d of March, 1859, between Francis Edward Lees, of Bradworthy, in the county of Devon, Esq., of the one part, and Adderley Barton Wren, of Bradworthy aforesaid, and William Hockridge, of Bradworthy, farmer, churchwardens of the said parish of Bradworthy, of the other part: The said Francis Edward Lees doth hereby, for himself, his heirs, executors, and administrators, agree to lend to the said A. B. Wren and W. Hockridge, as such churchwardens as aforesaid, and the said A. B. Wren and W. Hockridge, as such churchwardens as aforesaid, do hereby, for themselves and their successors, agree to accept from the said F. E. Lees the loan of an organ for the use of the parish church of Bradworthy aforesaid, upon the terms and conditions following:—

“1. The said F. E. Lees will at his own expense erect the said organ in the said parish church, and he, his executors or administrators, will, until the said organ shall be removed as hereinafter provided, keep the same in proper repair:

“2. It shall be lawful for the said F. E. Lees at any time during his life, and, after his death, during the lifetime of any descendant of his now living, for such descendant of his as may for the time being be possessor of the West Down estate, Bradworthy aforesaid, after the death \*383] of the said F. E. Lees and of all his \*descendants now living, for the heir at law for the time being of the said F. E. Lees, to remove the said organ at any time, and the said churchwardens and their successors shall not obstruct or interfere with such removal: and the said organ, when so removed, shall thenceforth become the absolute property of the person removing it:

“3. This agreement shall be executed in two parts: one part shall be kept by the said F. E. Lees, and the other shall be deposited in the parish chest.

“WILLIAM HOCKRIDGE.

“ADDERLEY B. WREN.

“FRANCIS E. LEES.”

Mr. Lees thereupon entered into the following contract with the plaintiff:—

“Memorandum of agreement made and entered into the 13th day of April, 1859, between Joseph William Walker, of No. 27, Francis Street, Tottenham Court Road, in the county of Middlesex, organ-builder, for himself, his executors, and administrators, of the one part, and Francis Edward Lees, of West Down, Bradworthy, in the county of Devon, Esq., for himself, his executors, and administrators, of the other part:

“The said Joseph William Walker doth hereby agree to build, make, and complete, and the said Francis Edward Lees doth hereby agree to accept and take, the church organ now in course of construction by the said Joseph William Walker, according to the specification hereunder written, at or for the price or sum of 698*l.*, to be paid in manner hereinafter mentioned: and the said F. E. Lees doth hereby agree to pay to the said J. W. Walker the sum of 70*l.* for the packing and carriage thereof to Bideford station, in the county of Devon, by railway, and for the fixing of such organ in the parish church of Bradworthy afore-

said; but the \*removal of such organ from Bideford station to Bradworthy church is to be at the sole cost and expense of the [\*384 said F. E. Lees; and the said contract is to be subject to the conditions and stipulations hereinafter contained, that is to say,—

“1. The said organ shall be constructed by the said Joseph William Walker of the best materials and workmanship, and according to the said specification hereinafter contained, and the plan or drawing hereto annexed, and shall be completed in the factory in Francis Street aforesaid on or before the 31st of August next, and, if approved of, shall be fixed in the parish church of Bradworthy aforesaid on or before the 1st of October, 1859, for the sum of 768*l.*; and no further charge is to be made by the said J. W. Walker on any account whatever (the removal of the said organ from the Bideford station to Bradworthy church aforesaid being at the expense of the said F. E. Lees, as hereinbefore mentioned).

“2. The said Francis Edward Lees shall pay to the said Joseph William Walker the said sum of 768*l.* by the following instalments, that is to say, the sum of 150*l.*, on the said 31st of August next, the further sum of 150*l.* on the 31st of August, 1860, the further sum of 150*l.* on the 31st of August, 1861, the further sum of 150*l.* on the 31st of August, 1862, and the further sum of 168*l.*, being the balance of the said sum of 768*l.*, on the 31st of August, 1863, together with interest at 5*l.* per centum per annum from the 31st of August next upon the above amount from time to time unpaid, until the whole sum of 768*l.* shall be fully paid and satisfied; liberty being reserved to the said Francis Edward Lees to pay such additional sum and sums of money in reduction of the said sum of 768*l.* at such other time or times as he may think fit.

“3. The said Francis Edward Lees agrees that he or \*some [\*385 competent person on his behalf shall, on or before the 31st of August next, inspect, test, and pronounce the said organ complete or otherwise, before it leaves the manufactory to be erected in the parish church of Bradworthy aforesaid: and if, on such inspection or testing of the said organ, there shall anything be discovered to be faulty or defective, the said Joseph William Walker shall with all convenient speed repair the same, and make good any defects. And on the said organ being completed and erected in Bradworthy church aforesaid, the contract of the said Joseph William Walker is considered to be at an end.

“4. That, in the event of the said organ being completed and erected as aforesaid, and the said sum of 768*l.* or any part thereof not being paid at the time or times hereinbefore mentioned, then it is hereby declared and agreed that the whole sum or balance, with the interest then due thereon, shall become due and payable to the said Joseph William Walker, and may be sued for and recovered accordingly; and in the mean time and until the said balance and interest shall be paid and discharged, the said Joseph William Walker shall have a lien on the said organ: and, in default of any or either of such payments as aforesaid at the time or times hereinbefore mentioned, he the said Joseph William Walker may either dispose of or remove the said organ, as he may think proper.

“5. That, in the event of default being made by the said Francis Edward Lees in any or either of such payments as aforesaid, he the

said Francis Edward Lees hereby agrees, that, for the purpose of enabling the said Joseph William Walker, his executors or administrators, to dispose of or remove the said organ as in the last clause mentioned, he will produce or cause to be produced unto the said Joseph William \*386] Walker, his executors or administrators, or to such persons or \*person as he or they may appoint, a certain memorandum of agreement bearing date the 3d of March, 1859, and made between the said Francis Edward Lees, of the one part, and Adderley Barton Wren, of Bradworthy aforesaid, and William Hockridge, of Bradworthy, farmer (churchwardens of the said parish of Bradworthy), of the other part. In witness, &c."

The organ was accordingly built and placed in Bradworthy church in December, 1859, and the first instalment of the purchase-money was duly paid. On the 12th of May, 1860, the plaintiff, having received information that Lees was in a state of embarrassment, and that an attempt had been made by the officers of the sheriff to enter Bradworthy church for the purpose of seizing the organ, sent a notice to the vicar and churchwardens, as follows:—

"12th May, 1860.

"Dear Sirs,—I beg to give you notice that the price of the organ erected by me in Bradworthy church has not been fully paid, and that, by virtue of the agreement, dated the 13th of April, 1859, made between me and Mr. Lees, I claim to have a lien on the said organ for 618*l.*, with interest thereon from the 13th of August, last, until payment,—being the balance of such price remaining unpaid: and I hereby give you notice not to part with the said organ to any person, or allow the same to be removed under any pretence whatsoever."

The above notice was enclosed in a letter, of which the following is a copy:—

"Dear Sirs,—Enclosed you will receive herewith a notice which I have been advised to send you in regard to the organ in Bradworthy church; and shall be obliged if you will kindly acknowledge the receipt thereof by return of post: and would you be good enough at the same \*387] time to inform me if the sheriff's \*officers have yet taken possession of the organ under the execution against Mr. Lees, and what is likely to be done with it if they have? I am very sorry to hear that Mr. Lees's affairs are in such a very bad state, and trust, under the circumstances, that you will assist me all in your power to obtain the balance due to me."

To this the defendant Clyde replied as follows:—

"Bradworthy Vicarage, May 15, 1860.

"My dear Sir,—I am sorry to say it is too true that Mr. Lees's property has been seized under an execution. I have had great trouble in keeping the officers from seizing the organ. How long I may be able to keep them out of the church I cannot say. *I have a large demand on Mr. Lees myself*; and likewise my parishioners. I am very sorry for your position, and fear it is not in my power to render you much assistance."

And the defendant Wren, as follows:—

“ Lenwood, May 19, 1860.

“ Dear Sir,—I am sorry to inform you that it is only too true that an execution has been taken on Mr. Lees's property, and he has bolted, owing more than 5000*l.* in this neighbourhood that I know of. The bailiffs have not as yet got possession of the organ: but I expect they are making arrangements with Mr. Clyde, and will have it in a day or two. If you have any legal claim on the organ, I would recommend your writing at once to Mr. Buckingham, the under-sheriff, at Exeter: if not, I fear you are only, like myself and many others, in a very unfortunate position, as I have the best reason for believing that the trustees will not have it in their power to pay a farthing to any one.”

On the 29th of May, 1860, the defendant Clyde wrote to the plaintiff, as follows:—

\*“ Bradworthy Vicarage, May 29, 1860.

“ Dear Sir,—I received from Mr. Lees some weeks since a [\*388 letter similarly worded to yours; and *I now inform you that I consider I have a lien on the organ, and, until I am satisfied, together with expenses, no one shall touch it.*”

The plaintiff on the 26th of May, 1860, obtained from Lees the following authority for the removal of the organ:—

“ Dear Sirs,—I beg to state for your guidance, that Mr. J. W. Walker, of, &c., the builder of the organ erected by him in Bradworthy church, has a lien upon it, and a right to remove it; and I beg you to consider this note a sufficient authority to you for allowing him to remove the organ whenever he thinks proper.”

The above authority was addressed “to the Rev. J. B. Clyde, and to Messrs. Wren and Hockridge, the churchwardens, or other the churchwardens of Bradworthy,” and it was sent to them by the plaintiff, enclosed in a letter, similarly addressed, as follows:—

“ June 4th, 1860.

“ Dear Sirs,—On the other side I beg to forward you a copy of Mr. Lees's authority for me to remove the organ in Bradworthy church, deposited there under an agreement dated the 3d of March, 1859, a duplicate of which is placed in the parish chest in the vestry of the church. I propose, therefore, to be at Bradworthy, with a sufficient staff of assistants for that purpose, on Monday next, the 11th instant, and shall then have sufficient time to remove the same, and make good any matters that may be necessary for carrying on Divine worship by the following Sunday.”

The plaintiff at the same time addressed another letter to the defendant Clyde, as follows:—

“ In regard to your favour of the 29th ult., I beg to state, that, in case I am refused possession of the \*organ, I shall hold you [\*389 responsible for any loss I may sustain in not being allowed to remove it, as mentioned in the enclosed letter, together with all charges I may be put to for travelling and other expenses of my assistants in going into Devonshire for that purpose.”

To this letter the defendant Clyde replied as follows:—

“Bradworthy Vicarage, June 6, 1860.

“Dear Sir,—I beg to acknowledge the receipt of your letter June 4. I am sorry to find you did not understand my letter. I must repeat, for your guidance, that I do not allow any one on any pretence whatever to enter the church during the week; nor shall I make any exception should you or your staff visit Bradworthy. I feel for you; but I am in a most painful position myself. As to your holding me responsible, I really do not know what you mean, as I cannot have any control over your movements. I shall take every care of the organ, for my own sake.”

The second instalment of 150*l.*, which by the agreement of the 13th of April, 1859, became payable on the 31st of August, 1860, being unpaid, the plaintiff's attorney wrote on the 15th of October to both the defendants, referring to the terms of the agreement between the plaintiff and Lees, and demanding possession of the organ.

To this demand the defendant Clyde on the 16th replied as follows:—

“Sir,—I beg to acknowledge the receipt of yours, dated the 15th of October; and in reply I have to inform you that I have nothing whatever to do with any agreement entered into with Mr. Lees and Walker.”

The defendant Wren on the 17th replied as follows:—

\*390] “Sir,—I beg to acknowledge the receipt of your letter of the 15th respecting the organ in Bradworthy church. The organ is retained in Bradworthy church, contrary to my wishes, by the Rev. Mr. Clyde; as I am perfectly aware that it belongs either to Mr. Lees's trustees or to Mr. Walker. The parties to whom it legally belongs shall have my best assistance in removing it at any time.”

And, in answer to an application by the plaintiff's attorney to the defendant Wren for a written authority for the removal of the organ, Wren's attorney on the 23d of October wrote as follows:—

“Dear Sir,—Mr. Wren has not the slightest desire to throw difficulties in the way of any claim your client may have on the organ in question; but, in the present position of affairs, it is asking too much of him to take upon himself to decide the rights of the various parties. You refer to an agreement of the 3d March, 1859. I have not a copy, nor am I altogether aware of its contents. Can you supply me with a copy? I can only add that Mr. Wren is willing to render your client all the assistance he safely and consistently can.”

On the 24th of October, the plaintiff's attorney sent Wren's attorney a copy of the agreement of the 3d of March, 1859, accompanied by the following letter:—

“Dear Sir,—I beg to enclose a copy of the agreement of 3d March, 1859, as requested in yours of yesterday. I am informed that in May last your client had a copy of the authority from Mr. Lees for Mr. Walker to remove the organ from Bradworthy church. I trust, therefore, that Mr. Wren will have no difficulty in sanctioning, as far as he is personally concerned, the removal of the organ whenever my client thinks proper.”

\*391] \*To this Wren's attorney replied as follows:—

“Exeter, 26 October, 1860.

“Dear Sir,—I am in receipt of yours, with copy agreement: but I

do not see how it alters the view I have taken, or authorizes Mr. Wren to adopt any other course than to remain passive in the matter. The organ is lent for the use of Bradworthy church, the churchwardens agreeing 'not to obstruct or interfere with its removal;' nor does he do so, the key of the church being kept by the rector, who refuses admission into the church, except on Sundays for Divine service. If I rightly understand, your client is the builder of the organ sold to Mr. Lees, but who unfortunately has not been paid for it. Still, Mr. Lees is the owner of it,—at least the agreement referred to so treats him. By him it is lent for the use of the church; the churchwardens agreeing not to object to his removing it: nor do they now, so far as they are concerned. After so treating him as the owner, I do not see how they can take any active steps to give it up to your client, although they may feel the hardship of the case, and have every kind feeling towards him. The claimants to it must settle it amongst themselves. As regards legal proceedings against Mr. Wren, I will undertake to appear for him. Mr. Wren would rather assist your client than otherwise."

On the 27th October, the plaintiff's attorney again wrote to Wren's attorney, as follows:—

"Dear Sir,—I forward you per book post a copy of the agreement between Mr. Lees and my client; and I trust it will sufficiently show that the property in the organ is vested in Mr. Walker. As the instrument was placed in the church under the care of your client and his co-churchwarden, I hope to hear from you at your early convenience that Mr. Wren consents to its being removed without further delay."

\*To this Mr. Wren's attorney replied on the 29th, as follows:— [\*392

"I am in receipt of copy agreement of 13th April, 1859, and, without entering into discussion on that instrument, would say I do not see how it alters the position of affairs as regards the churchwardens. They admit the organ to be a loan by Mr. Lees for the use of the parish church, on their agreement not to obstruct or interfere with its removal by Mr. Lees, or on his authority; nor do they. There it is, where Mr. Lees himself placed it; and, so far as they are concerned, the parties entitled to remove it are at full liberty to do so. You well know the vicar has the primary right to the church and to the key; the duties of the churchwardens being to keep it in repair. He has the key, and will not open the church except on Sunday. He claims, as I understand, to have a lien on the organ: therefore, its removal is not prevented by any act or omission on the part of the churchwardens, but the act of the vicar. I shall be obliged by your stating in definite terms what it is you call on and require the churchwardens to do, that I may be better enabled to advise Mr. Wren on your demand; it appearing to me the main and real question,—the right to the organ,—will have to be fought with the sheriff, who claims to levy on it as the property of Mr. Lees, under the *fi. fa.* against that gentleman's goods."

On the part of the defendants, it was submitted, that the agreement under which the plaintiff parted with the possession of the organ was inconsistent with his having either property therein or a right of lien, and that there was no evidence of conversion by either of the defendants: and the case of *Howes v. Ball*, 7 B. & C. 481 (E. C. L. R. vol. 14), 1 M. & R. 288 (E. C. L. R. vol. 17), was relied on.

The learned Judge referred to *Reeves v. Capper*, 6 Scott 877, 5 N. C. 136 (E. C. L. R. vol. 35): and, the jury having found a \*verdict for the plaintiff as against the defendant Clyde, and in favour of the defendant Wren, his lordship reserved leave to the defendant Clyde to move to enter a nonsuit, if the Court should be of opinion that the organ was not the property of the plaintiff, or that there was no evidence of conversion.

*D. Seymour*, Q. C., in Hilary Term last, obtained a rule nisi accordingly, on behalf of Clyde, on the grounds,—“first, that it was not proved that the organ was the property of the plaintiff,—secondly, that there was no evidence of a conversion or detainer by Clyde.” He further submitted, on the authority of *The Churchwardens of Clapham v. The Rector, &c., of Clapham*, 3 Haggard’s Eccl. R. 10, that no person could lawfully remove an organ from the parish church without a faculty; and that the churchwardens, and not the vicar, were the proper persons to apply to for the restoration of the organ, if the plaintiff was entitled to it.

*Lush*, Q. C., on the part of the plaintiff, also moved to enter a verdict against the defendant Wren, on the ground that “there was evidence to prove that the defendant Wren had converted or detained the organ.” The Court directed that this should form part of *Seymour’s* rule; but it was ultimately abandoned.

*Lush*, Q. C., and *J. D. Coleridge*, in Easter Term, showed cause.—That the organ still remained the property of the plaintiff, is clear from the agreement of the 31st of August, 1859. *Reeves v. Capper*, 6 Scott 877, 5 N. C. 136 (E. C. L. R. vol. 35), is precisely in point. There, one W., the master of a vessel belonging to the defendants, on the eve of a voyage, in consideration of an advance of 50*l.*, by a memorandum \*394] dated the 23d of December, \*1836, made over to them as their property, until the sum advanced should be repaid, his chronometer and all his nautical instruments then on board the vessel, they allowing him the use of the same for the voyage. The chronometer was at this time in the hands of the makers for safe custody and regulation: the transfer or charge was not communicated to them. W. used the chronometer for the voyage, and returned it to the makers as before, and afterwards pledged it to the plaintiff as security for a debt. Upon an issue under the Interpleader Act, to try the property in the chronometer, it was held that it vested in the defendants under the agreement of the 23d of December, 1836, until the advance was repaid. Then, as to the conversion,—there was abundant evidence to fix the defendant Clyde. He holds the key of the church, and refuses to let any person in for the purpose of removing the organ; and he sets up a claim of lien upon it on his own behalf, for which there was not the smallest pretence.<sup>(a)</sup> [BYLES, J.—He does not object to the removal of the organ on the ground of the absence of a faculty.] Not at all. Besides, there is no necessity for a faculty for the removal of a thing placed in a parish church under circumstances like those of the present case: and, if there were, the law of property is not to be controlled by the fact of the vicar or churchwardens being subject to ecclesiastical censure for permitting

(a) The supposed lien of Clyde was in respect of certain bills which he had accepted for the accommodation of Lees, and which were then outstanding.

its removal without a faculty. The organ in a parish church is in general the property of the parish, not of the rector or vicar.

*D. Seymour*, Q. C., in support of the rule.—The \*plaintiff [\*395 clearly had no property in the organ in question. The effect of the agreement of the 31st of August, 1859, was, to vest the property in the instrument absolutely in Lees, subject to some rights as between him and the plaintiff in the event of the instalments not being paid when due. The license to remove it was merely personal as between them. This is an attempt to create a new description of contract by hypothecation. *Howes v. Ball*, 7 B. & C. 481 (E. C. L. R. vol. 14), 1 M. & R. 288 (E. C. L. R. vol. 17), is strongly corroborative of this view. There, A. agreed to give B., a coachmaker, 100*l.* for a coach, and to pay for the same four bills of 25*l.* each; and, further, that B. should have a claim upon the coach until the debt was duly paid. The bills were given, but the first was not paid when it became due. A. died: his administratrix sent the coach to B. to have the wheels repaired; B. detained it, on the ground that the bills had not been paid: and it was held, in an action of trover brought by the administratrix, that the agreement operated as a mere license from A. to B. to take the coach if the bills were not paid; and that it was not transferable; and that, the coach being vested in the administratrix by operation of law, the defendant was not justified in detaining it. “The utmost effect,” said Lord Tenterden, “that can be given to this instrument, is, to construe it as a license given by Howes to Ball to resume possession of and retain the coach, in case Howes did not pay the bills. Construing it as a license, it is a personal license, not available against any person to whom Howes might transfer the property. It could not therefore be available against his administratrix, to whom the property came by operation of law. If Howes had lived, and the coach, on non-payment of the bills, had been taken out of his possession, and he had brought an action, the defendant might, in bar of that, have \*relied on the instrument. But, as [\*396 the license was a mere personal license, not transferable, supposing the property had been transferred by the act of the party or by operation of law, we are of opinion that the defendant was not entitled to take and detain the coach.” So, in *Crawshay v. Homfray*, 4 B. & Ald. 50 (E. C. L. R. vol. 6), the wharfage, &c., due upon goods imported was, by the course of trade, paid by the importer at the Christmas following the importation, whether the goods were in the mean time removed or not. The goods were sold to A., and, after Christmas, the merchant importer became bankrupt: and it was held that there was no lien on the goods for the wharfage, &c., as against A. The point as to the want of a faculty is not relied on. [WILLES, J.—There was no faculty obtained for placing the organ there.]

ERLE, C. J.—I am of opinion that this rule should be discharged. The action is brought by the plaintiff to recover the possession of an organ which had been erected in the church of the parish of Bradworthy, of which the defendant Clyde is vicar: and the first question is, whether the plaintiff had such a right of possession as to enable him to maintain trover. It appears that the organ was ordered by one Lees, the occupier of an estate in the parish: and the agreement entered into between the plaintiff and Lees on that occasion is the essential document upon which our judgment turns. It is in the nature of a contract of pur-

chase: but I am of opinion that the effect of the contract taken altogether is, not to pass the property in the organ absolutely to Lees, but to give him the present right of possession, subject to a right of property in the plaintiff. The agreement provides that the plaintiff shall build and Lees accept an organ to be constructed according to a certain \*397] specification, for the \*price of 698*l.*, with an additional 70*l.* for placing it in the parish church; and Lees undertakes to pay for it by certain instalments. It then goes on to provide, that, "in the event of the said organ being completed and erected as aforesaid, and the said sum of 768*l.* or any part thereof not being paid at the time or times thereinbefore mentioned, then it was thereby declared and agreed that the whole sum or balance, with the interest then due thereon, should become due and payable to Walker, and might be sued for and recovered accordingly; and in the mean time, and until the said balance and interest should be paid and discharged, Walker should have a lien on the said organ; and, in default of any or either of such payments as aforesaid at the time or times thereinbefore mentioned, Walker might either dispose of or remove the said organ as he might think proper." Such is the arrangement between the parties. The intention was, that Walker was not to part with the property, but only with the possession, until all the instalments were paid. I think the case of *Reeves v. Capper*, 6 Scott 877, 5 N. C. 186 (E. C. L. R. vol. 35), is quite consistent with this view, and that *Howes v. Ball*, 7 B. & C. 481 (E. C. L. R. vol. 14), 1 M. & R. 288 (E. C. L. R. vol. 17), is entirely distinguishable. The terms of the contract there were, that Ball should build a coach for Howes, the intestate, for 100*l.*, to be paid by four instalments of 25*l.* each, and that Ball should have a lien on the coach until the debt was duly paid: and these words were held not to be specific enough to leave the property in the maker. The letters of Lees recognise the reserved right of the plaintiff, and fully sanction the notion that the property remained in him. Then, has the defendant Clyde been guilty of a conversion? I think the evidence showed that he prevented the plaintiff from exercising his right to remove the organ. \*398] He had the key of the church, and kept the door \*locked. He purposely kept the plaintiff out in order to prevent him from taking away the organ, saying that he himself had a lien upon it: and thus he continued to hold it adversely to the plaintiff. I therefore think he was clearly guilty of a conversion. The point as to the faculty was very properly abandoned. Assuming that a faculty was needed to enable the plaintiff to remove the organ from the parish church, the want of a faculty would not affect the rights of the parties under the general law.

WILLES, J.—I am of the same opinion. If the organ had been delivered subject to an agreement that the plaintiff might seize it in the event of Lees failing to pay the instalments, that would have been such a personal license as existed in the case of *Howes v. Ball*. But I apprehend it was perfectly competent to the parties to enter into an agreement, that, though the possession and use of the organ were to be in Lees or his nominees, yet the property should remain in the plaintiff, and should not completely vest in Lees until the whole of the instalments were paid. We have here an agreement to which it is impossible to give full effect without putting upon it this latter construction. No doubt,

the intention of the parties was to give the plaintiff effectually a right to the organ until the whole of the instalments were paid. As to the rest of the case, I cannot understand how this dispute could have arisen. The plaintiff has built an organ upon which about 620*l.* remains due. The vicar and churchwardens have had the use of it for several months without paying for it. The plaintiff is entitled under the terms of his agreement to remove it; yet, for some reason, the defendant Clyde refuses to permit its removal, and insists upon keeping 620*l.* worth of the plaintiff's goods for which he has not been paid. It is \*un- [\*399 questionable that the defendant has had the organ. I agree with the defendant's counsel, that, to entitle the plaintiff to maintain this action, it must be shown that the defendant refused to deliver up the organ after the plaintiff's right to demand it had accrued. But we cannot shut out everything that passed before the 31st of August, 1860: we may look to the conduct of the parties before that day. The plaintiff, it appears, had written to the defendant Clyde explaining to him the terms of his agreement with Lees, and requesting permission to remove the organ. The defendant, however, refused to permit the church door to be opened, and himself claimed to have a lien upon the organ. He never retracted that, but to the last insisted on keeping the organ. What is the just conclusion from such conduct? I think there was abundant evidence to fix the defendant Clyde with a conversion.

BYLES, J.—I am of the same opinion. If the matter had stood unencumbered of technical difficulties, it would have been clear that the intention of the parties to the agreement of the 13th of April, 1859, was, that, if default should be made in payment of the instalments, the organ should remain the property of the maker. But a difficulty arises from the statement in the document that the plaintiff should have a *lien* upon the organ until the balance and interest should be paid. It is to be observed also that the defendant Clyde signed the agreement of the 3d of March, 1859, as a witness, and thereby in some sort became a party to the engagement to give up the organ on demand.

KEATING, J.—I entirely agree with the rest of the Court. The only difficulty I have felt has arisen from the use of the word "*lien*" in the agreement of the 13th of \*April, 1859. If the effect of that [\*400 agreement had been only to confer upon the plaintiff a lien upon the organ for the unpaid purchase-money, there might have been a difficulty in holding that the property remained in the plaintiff. But I am of opinion that the property did not pass out of Walker. I also agree that there was evidence of a conversion by the defendant Clyde. As to Wren, the verdict will be for him on not guilty and non detinet.

Rule discharged.

BERRIDGE and Another v. WARD. *Feb. 2.*

Where a piece of land which adjoins a highway is conveyed by general words, the presumption of law is, that the soil of the highway usque ad medium filum passes by the conveyance,—even though reference is made to a plan annexed, the measurement and colouring of which would exclude it.

THE first count of the declaration stated that the defendant entered land of the plaintiffs' in the parish of Minster, in the county of Kent, and dug holes therein, and placed thereon large quantities of stones and bricks, &c.

The second stated that the plaintiffs were possessed of certain land in the parish of Minster, in the county of Kent, and ought of right to have a way over the said land through certain other land into a public highway, and so from thence back again, for themselves and their servants, on foot and with horses, carts, and carriages, at all times, at their free will and pleasure; and that the defendant wrongfully placed and kept stones and bricks, and dug holes upon the said land, and in and upon and across the said way, and thereby the same was obstructed and stopped up, and the plaintiffs were deprived of the use and benefit thereof.

The third count claimed the same way as a footway only.

\*401] \*The fourth count stated that there was a certain public highway for all the Queen's subjects to pass and repass, at their pleasure, on foot and with horses, carts, and carriages; that the plaintiffs were possessed of land abutting on and next adjoining the said highway, and entitled to free egress and ingress to the said highway, and from the same to the said land, and that the said land was of right accessible from the said highway; and that the defendant wrongfully placed and kept large quantities of stones and bricks upon the said highway in front of the plaintiffs' land, and the plaintiffs were thereby hindered from using their right of egress and ingress and from using the said land in so free a manner, and making ways therefrom into the said highway, and from erecting and building houses upon the same, and thereby the land became inaccessible from the said highway, and became and was deteriorated in value.

The defendant pleaded,—first, to the whole of the declaration, not guilty,—secondly, to the first count, that the land was not the plaintiffs',—thirdly, to the first count, liberum tenementum,—fourthly, to the second count, a traverse of the plaintiffs' right of way,—fifthly, a similar plea to the third count,—sixthly, to the last count, a traverse that there was a public highway, or that the plaintiffs were entitled to free egress or ingress from their land to or from the supposed highway to the said land; nor was the said land, nor of right ought it to have been, accessible from the supposed highway, as alleged. Issue thereon.

The cause was tried before Cockburn, C. J., at the last Summer Assizes for the county of Kent.

It appeared, that, in 1852, the plaintiffs purchased at a public auction certain land in the parish of Minster, in the Isle of Sheppy, part of a large portion of marsh land formerly the property of the late Sir \*402] \*Edward Banks. In the conveyance the land so purchased was described as "all those pieces or parcels of freehold land situate, lying, and being in the parish of Minster, in the Isle of Sheppy, in

the county of Kent, near to the town of Sheerness, commonly called or known by the names, and containing the quantities mentioned and set forth in the schedule hereunder written, and the situations, boundaries, and numbers whereof are set forth in the plan thereof drawn on the skin of parchment annexed to these presents," &c.; and "all the pieces of land and hereditaments hereby conveyed, or intended so to be, being on the said plan coloured red, together with all outhouses, edifices, buildings, hedges, ditches, fences, roadways, paths, passages, water-courses, timber and other trees, easements, commons, profits, privileges, commodities, advantages, emoluments, hereditaments, rights, members, and appurtenances whatsoever to the said pieces or parcels of land, gas-works, hereditaments, and premises, or any part thereof, belonging or appertaining."

The quantity of land sold to the plaintiffs was 11a. 9p.: and the pieces coloured red on the plan contained that quantity, exclusive of the road.

The defendant in 1856 became the purchaser of another portion of the same property, and claimed to be entitled to the spot in question as part of his purchase.

In support of the first and second counts of the declaration, the plaintiffs relied upon the conveyance: and as to the fourth count, they gave the following evidence of user:—

Charles Colthorpe, parish clerk of Warden, in the Isle of Sheppy, stated that he had known the road from Banks Town to Scrap's Gate from 1810; that he had known butchers' and gardeners' carts go along it; that it was the direct road from Mile Town (Sheerness) to Scrap's Gate, and also from Scrap's Gate to Minster; and that [\*403 he never heard of any one being prevented. On cross-examination, he stated that he had driven his cart along the road from Mile Town to Minster; that he went to the mill there, and on other business besides; that Squire Chalk was then the proprietor of the 100 acres; that he had met him while driving there, but he never prevented him; that ten or twelve years ago, a gate was put up a quarter of a mile from Scrap's Gate towards Sheerness, and is there now; that it was fastened with a chain and padlock to keep people out; that there is a gate at the Rock House, which may have been up twenty years; that that gate was sometimes closed and sometimes open, but he never saw it fastened; and that he never knew a gate between that and Mile Town.

Charles Hoare stated, that, in 1798, he came from Rochester to Sheppy in a post-chaise, past Scrap's Gate, where there was a sort of skeleton of a gate; that, after passing that, he went along part of the beach, then over the sea-wall, and then along the left of the sea-wall to Mile Town; that there was no gate after passing Scrap's Gate; that he had lived in the island permanently from 1808, and was a chimney-sweeper, and till within the last ten years kept carts and horses and donkeys; that he had a contract with government, and used to go this road to the different coast-guard stations, and was never interfered with, nor ever asked leave; and that others besides himself used the road. On cross-examination, he said he had been by the Rock House many times, but never saw a gate there till within the last six years; and that he saw a gentleman force it open, it being locked. On re-examination, he stated that the stone was taken along the road in question to

build the Rock House about forty-five years ago ; and that there was no other road from thence to Mile Town.

\*404] \*John Reece stated that he occupied Danley farm twenty years, left it thirty years ago, and returned to Warden nine years ago ; that, when he went to the farm, there was a road from Scrap's Gate to Mile Town, and that he had been that way with wagons going to the beach to get stone to mend the road, and had gone along it to Mile Town on horseback ; that he had seen many carts and wagons belonging to farmers using the way : that Chalk never stopped or attempted to stop any one ; that he did not recollect any gates, though gates were common at that time in Sheppy ; that, since he came back, he had seen people using this road with horses and carts ; that a gate had since been erected across the sea-wall, and kept locked ; and that another gate had been put up at Rock House. On cross-examination, he stated that he had seen a man named Lushington, a gardener, who lived at Scrap's Gate, going along the road with his cart ; that he was a tenant of the defendant's ; and that the road was used for the purposes of the occupiers of the 100 acres.

William Colney stated that he lived at Cockle farm fifty-two years ; that he remembered this road forty years ; that it ran from Minster to Sheerness ; and that people used to go along it with wagons, carts, and horses. On cross-examination, he stated that there was no obstruction in Chalk's time ; that, in Banks's time, he once, and once only, found the Rock House gate locked, and rode round the house ; that he was surveyor of highways for Minster parish for nine years ; that he had been by this road from Scrap's Gate to Sheerness with stone, and also with corn ; that, from Minster to Scrap's Gate, the parish repaired the road, and after that it did not need it ; that, from Minster to Scrap's Gate, was a mile, then to Mile Town a quarter to half a mile, and thence to Sheerness was a continuation ; and that between Minster and

\*405] \*Scrap's Gate was the workhouse (now the union) and two or three farm-houses along the road.

George Quint stated that he had known the neighbourhood since 1819 ; that the Rock houses (which belonged to one Alston, with whom the witness worked as a labourer) were not then finished ; that there was no other road than that in question from there to Sheerness ; that it was always a public road since he knew it ; that he had seen people going along it in carts and wagons, butchers, bakers, and every one else ; that Alston kept the road in repair after the houses were built ; that he never knew any one stopped during the twenty-five years he worked for Alston ; that one Quested built and occupied a cottage near Rock House ; and that there was no other road than this for that house.

George Bridges stated that he worked at Scrap's Gate for Jackson, who was the owner of the cement-works ; that Jackson used the road with his carts and horses ; that there was one gate at Cheney Rock from the time he first knew it ; that he never knew that gate locked but once, when he informed Jackson, who went with him and with a hammer broke the lock ; that Mr. Banks was then the owner of the 100 acres ; that he had since seen butchers' and bakers' carts and farmers' wagons on the road ; that there were no fences when he first knew it ; that posts and rails were put up about 1831 ; that Jackson built some houses at Scrap's Gate in 1833, and that the wood-work and slates were taken by

witness from Mile Town in carts along this road; that he had met Mr. Banks on the road while so doing, and he said nothing to him; that he was never interrupted; that, when the road got bad, he used to get a cart-load of gravel from the beach and repair it; that he had seen other people using the road,—one Webb, a baker, of Mile Town, [\*406 \*butchers from Shoerness, and farmers with carts; and that he had seen one Merchant, a man in Alston's employ, repairing the road. On cross-examination he stated that Jackson was tenant of Mr. Wyatt, the lord of the manor; that he did not recollect a gate at Scrap's Gate; that there was one at the Rock House, which was old and dilapidated in Jackson's time, just fit to keep the cattle in; that Alston was Banks's tenant after Banks bought the estate; and that the butcher and bakers before spoken of were going to the farm-houses and the Rock House.

Joseph Fare Hall stated that his father lived at the Waterloo Inn, Minster; that, when a boy, he used to go along the road on foot, on horseback, and in carts, frequently, and other people did the same; and that he never knew of any one being prevented. On cross-examination he said that the inn belonged originally to Mr. Wyatt, afterwards to Sir Edward Banks, and then to Mr. Banks, the son; that his father was tenant to them until the property was sold; that he had known farmers come with stone from the beach between Scrap's Gate and Mile Town, to repair the road; and that carts also came to Cheyney Rock to get coals. On re-examination he said that the use of the road was not confined to Banks's tenants, but any one else used it.

Daniel Horsen stated that he had known the road since 1841; that it was used mostly by farmers, but also by others going from Minster to Sheerness; and that anybody that liked went that way. On cross-examination he said that he knew of some gates, but never knew them locked; that he went that way once or twice every week; and that he had heard of a gate being locked, but never found it so.

Harriet Ellis, daughter of Mr. Quint who occupied the Rock House, stated that she had seen wagons \*and light carts using the road, and also gigs driven by the officers from Sheerness; and that [\*407 there was a gate, but that she never knew it to be locked.

James Monk stated that he came to Mile Town thirty years ago; that he lived for eleven years (from about 1839) with Webb, a baker, in Mile Town, and twice a week drove his cart along this road, and never was stopped or interfered with; that he had seen other people use it; that he lived for a year and a half with Mr. Ford, a farmer, at Eastchurch, three miles beyond Minster; that he also lived two years with one Holbeck, a dealer in milk, and used to go twice a day along the road for milk; that, after the property was sold, the gate at the Rock House was locked; and that on one occasion (six years ago), when witness was present, Mr. Smithson, the landlord of the Royal Hotel, came up, and, finding the gate locked, took it off its hinges, and said he would not have it locked. On cross-examination, he said he used to supply three people at Eastchurch with bread, and others along the road; that he used to bring corn from Eastchurch to Sheerness, and then take back beech from Scrap's Gate; that his master (Holbeck) had cows in the 100 acres, and witness used to milk them and bring the milk into Sheerness; that he did not supply milk along this road, there being no houses

there; that there was a gate across the road at the Rock House, which always stood open, an old gate; and that he never had to get down to open it.

William Richard Brightman, fifty years an estate-agent at Sheerness, stated that he had known the road ever since he could remember, and had known it used for walking and driving by any one, and never saw any one stopped.

On the part of the defendant, it was objected that the plaintiffs had \*408] failed to make out their case as to the \*first count, inasmuch as the conveyance under which they claimed passed only the particular pieces of land described by measurement and coloured red in the plan, to the exclusion of any part of the road: and the case of *The Marquis of Salisbury v. The Great Northern Railway Company*, 5 C. B. N. S. 174 (E. C. L. R. vol. 94), was relied on. Upon this point, his Lordship reserved the defendant leave to move. As to the second count, it was submitted that there was no evidence of any obstruction to the plaintiffs' access by the gate,—that being all they were entitled to. And, as to the rest, it was insisted that the frequent interruptions displaced the evidence of user as establishing a public highway; that the road was in truth a mere occupation way, used, not by the general public, but by the tenants and occupiers of houses and farms along the line.

Several witnesses were called on the part of the defendant, to prove that the locus in quo was a mere track for the use of the occupiers of the neighbouring farms, tenants of the Bankses, and not a made road: that several persons had been on different occasions prevented from passing along it; that the gate at the Rock House was always closed, sometimes locked, but not before 1816, when by the direction of Chalk a lock and chain were put on it, nor after 1832; and that the lock was usually broken by some one within two or three days after it was put on.

It was also proved that the actual measurement of the land purchased by the plaintiffs, including the fence but excluding the adjoining road, was  $11\frac{1}{4}$  acres,—the measurement inserted in the schedule to the conveyance being 11a. 5p.

The question on the first count being reserved, his Lordship left it to the jury, on the second and third counts, to say whether there was a public highway: and, as to this,—first, was there an ancient public \*409] \*highway,—telling them, with reference to the evidence of obstruction, that, if there was once a public right of way, no subsequent obstruction by the lords of the manor or owners of the property could operate to destroy the right the public had once acquired,—secondly, if there was not an ancient highway, was there a dedication by Chalk? On this question, his Lordship called attention to the fact that *no gate was kept closed between 1816 and 1832*; the defendant's witness Whitehead showing *that the gate at the entrance of the 100 acres was last closed forty-four years ago*, and the defendant's witness Sharp showing *that the gate at the Rock House was first locked in 1832*: while the evidence showed that the way was used during all the interval: and he adverted to the possibility, that, after the Rock House was built, Chalk thought it no longer worth his while to resist the road being used by the public,—thirdly, was there any dedication by Banks? His Lord-

ship called attention to the evidence of his having directed that thirty feet should be left between the fence and the sea-wall, as possibly warranting the inference either that he recognised an existing highway or intended to establish one.

The jury returned a verdict for the plaintiff, with nominal damages, —saying that they were of opinion that an ancient highway had been made out.

*Montagu Chambers*, Q. C., in Michaelmas Term last, obtained a rule nisi to enter a verdict for the defendant on the second and third pleas, “on the ground that the evidence did not prove that the land on which the trespass was committed was the plaintiffs’ soil and freehold, and disprove that it was the defendant’s soil and freehold ;” or for a new trial “on the ground that the Judge misdirected the jury, in confining their attention to the question whether there \*had been a highway [\*41C from time immemorial, as stated by some witnesses, viz., Hoare and others, and directing them to consider that question in the first instance, not directing their attention to the evidence given as to the interruptions subsequent to the acts of user spoken to by those witnesses, and which tended to prove that there never had been a dedication of the alleged highway to the public; and that the finding of the jury was against evidence.”

The learned Chief Justice appended to his report the following remarks:—“I am not dissatisfied with this finding, inasmuch as there was evidence of public user (in one instance as far back as 1798) anterior to any obstruction by Chalk, by fastening the gate: and, if the evidence of Whitehead, one of the defendant’s witnesses, was correct, the obstruction had first been offered by Chalk in 1814, prior to which time there was ample evidence of user. Nor was it clear how far this obstruction, which was desisted from altogether in 1816, had been enforced while it lasted; all persons appearing to have been let through who applied. But I should have been better satisfied if the jury had founded their verdict on a right of way by dedication, there being cogent evidence of this in the fact of the discontinuance by Chalk, the owner of the land, in 1816, of the only gate attempted to be kept closed up to that time (any other existing gates being only cattle or marsh gates), and the uninterrupted and constant user by the public till 1832, when the Rock House gate was for the first time closed, on a change in the ownership,—a proceeding which appears to have been resisted as often as attempted. I think there was abundant evidence of a public right of way; but I think a right of way by dedication would have been the safer finding. On the whole, however, I am not dissatisfied with the verdict.”

\**Bovill*, Q. C., *Lush*, Q. C., and *Denman*, showed cause.— [\*411 The jury upon a balance of testimony have found that the locus in quo was an ancient highway; and the Lord Chief Justice reports himself not dissatisfied with that finding. There was no evidence to show that the defendant had the slightest interest in this strip of land. And, as to the alleged misdirection, that is set at rest by the report of the learned Judge of the manner in which he left the question to the jury. The only matter remaining to be considered is, whether the description in the conveyance to the plaintiffs passed a moiety of the road,—the suggestion on the part of the defendant being that the

quantity (11 a. 5 p.) marked on the plan annexed thereto was satisfied, the road being excluded. In *The Marquis of Salisbury v. The Great Northern Railway Company*, 5 C. B. N. S. 174 (E. C. L. R. vol. 94), where the adjoining road was held not to pass by the conveyance, the plaintiff had conveyed by measurement the two pieces of land at each side of the road: and the general principle was conceded; for, in the course of his judgment, Williams, J., says (p. 209),—"It is not disputed by Mr. *Lush* (for the plaintiff), that, in the ordinary case, where a man who is the owner of two pieces of land conveys them to a purchaser, if a turnpike-road lies between them, the soil of the road passes by the conveyance, although the conveyance is silent as to its existence, and although the particular measurement of each piece is given, and would exclude the road." That was an exceptional case. [WILLES, J., referred to *Simpson v. Dendy*, 5 C. B. N. S. 433 (E. C. L. R. vol. 98). There, the conveyance of a field, described as "Chamberlain's Field, containing by estimation 3a. 3r. 35p., be the same more or less, abutting towards the west on Hall Lane," was held to vest in the grantee the soil of Hall Lane usque ad medium filum viæ.] In a case of *Lord v. The Commissioners for the City of Sidney*, 12 Moore's P. C. 473, this principle was applied where the boundary was a creek. In 1810, the Crown made a grant to R. of 135 acres of land in New South Wales, described as bounded on the west by N. farm, on the north by an east line of 30 chains, on the east by a south line to a small creek, and on the south by that creek and the water of Botany Bay, at the mouth of Cook's River. *It was not necessary to include any portion of the creek to make up the quantity of land specified in the grant.* In 1823, the Crown made a grant of 600 acres of land higher up the creek to L., in which the land was described as bounded on the north-west by a line from the south-east corner of R.'s farm to the south-west corner of W.'s farm, on the north-east by W.'s farm, on the south-east by a line bearing west, south to Botany Bay, to a creek and R.'s farm. This grant contained a reservation that the Crown was to be entitled to "any quantity of water, and any quantity of land, not exceeding ten acres, in any part of the said grant, as might be required for public purposes." L. afterwards became owner of the land comprised in the grant to R. The water of the creek was used for turning a mill erected on R.'s land, and for other beneficial purposes. On resumption by the Crown, under the powers of an act of council of New South Wales, 17th Vict. No. 35, of a portion of such lands, and diversion of the stream flowing in the creek. It was held that the grant by the Crown in 1810 to R., of *land bounded by the creek*, passed the soil of the creek ad medium filum aquæ, as the description of boundaries in the grant did not exclude from it that portion of the creek which by the general presumption of law would go along with the ownership of the land on the banks of it. In delivering judgment, Sir J. Coleridge says that the Court "are clearly of opinion, that, upon the true construction of this grant, the creek where it bounds the land is, ad medium filum, included within it. In so holding, they do not intend to differ from old authorities in respect to Crown grants; but, upon a question of the meaning of words, the same rules of common sense and justice must apply, whether the subject-matter of construction be a grant from the Crown or from a subject: it is always a question of intention, to be col-

lected from the language used with reference to the surrounding circumstances. If lands granted were described as bounded by a house, no one could suppose the house was included in the grant: but, if land granted were described as bounded by a highway, it would be equally absurd to suppose the grantor had reserved to himself the right to the soil *ad medium filum*, in the far greater majority of cases wholly unprofitable." The presumption that the soil of a road *usque ad medium filum viæ* belongs to the owners of the adjoining lands, was held in *Holmes v. Bellingham*, 7 C. B. N. S. 329 (E. C. L. R. vol. 97), to apply equally to a private as to a public road. And see Sheppard's Touchstone 89.

*Montagu Chambers*, Q. C., and *Hannen*, in support of the rule.—The learned Judge substantially misdirected the jury. He did not put it to them that for several years the gate at the end of the 100 acres was kept fastened and as private property. He told them in substance that the rule of law was, once a highway, always a highway,—that, if they found that this had been a public highway from time immemorial, they might dismiss from their minds all the evidence of obstruction, all that occurred since 1816. Between 1808 and 1816, Chalk, it appears, kept the 100 acres as his own private field; and the gate leading to it was kept locked. In 1832, a gate was erected by Banks: that was a conclusive negation of any intention on his part to dedicate the way to the public. Beyond the Rock \*House, it is conceded, there was no [\*414 public way at all. The principal evidence to establish an immemorial way was that of Hoare, the post-boy and chimney-sweep: but that was explainable. Upon such loose evidence as this, it will be too much to hold the right to be concluded, as it virtually will be by this verdict, if it be allowed to stand. The real question between the parties has been avoided. [ERLE, C. J.—There was evidence of public user of the way from the earliest time; then there was evidence of obstructions; and then it was shown that many times were the obstructions broken down, and nobody brought into question for it.] It was not shown that this was done to the knowledge of the owner of the land. Then, as to the description of the land in the grant,—the question is, what did the grantors intend to convey; and the answer is to be gathered from the language of the deed, and not from extraneous circumstances. In *Simpson v. Dendy*, 8 C. B., N. S. 433 (E. C. L. R. vol. 98), the land was described as "bounded by Hall Lane;" and in *Lord v. The Commissioners for the City of Sydney*, 12 Moore's P. C. 473, as "bounded on the south by a small creek;" and it was held that a moiety of the lane in the one case, and of the creek in the other, passed by the conveyance, though it was not *necessary* to include any portion of the lane or the creek to make up the quantity of land specified in the grant. Here, however, the language of the conveyance is precise and clear, and excludes the highway. It is "all those pieces or parcels of freehold land, situate, lying, and being in the parish of Minster, in the Isle of Sheppy, in the county of Kent, near to the town of Sheerness, commonly called or known by the names, and containing the quantities, mentioned and set forth in the schedule hereunder written, and the situations, boundaries, and numbers whereof are set forth in the plan thereof drawn on the skin of parchment annexed to these presents;" and \*again [\*415 "all the pieces of land and hereditaments hereby conveyed, or

intended so to be, *being on the said plan coloured red.*" [WILLES, J.—There are also the very large words, "together with all outhouses, edifices, buildings, hedges, ditches, fences, roadways, paths, passages, watercourses, timber and other trees, easements, commons, profits, privileges, commodities, advantages, emoluments, hereditaments, rights, members, and appurtenances whatsoever to the said pieces or parcels of land, gas-works, hereditaments, and premises, or any part thereof, belonging or appertaining." ] That which is intended to be conveyed is precisely defined.

ERLE, C. J.—I am of opinion that this rule should be discharged. As to the first branch of it, which seeks to enter a verdict for the defendant on the second and third pleas, on the ground that the evidence failed to prove that the land on which the trespass was committed was the plaintiff's soil and freehold, I think the counsel for the defendant have failed to sustain that point, because I am of opinion, that, where a close is conveyed with a description by measurement and colour on a plan annexed to and forming part of the conveyance, and the close abuts on a highway, and there is nothing to exclude it, the presumption of law is that the soil of the highway *usque ad medium filum* passes by the conveyance. The cases cited on the part of the plaintiffs establish that. Then, as to the alleged misdirection,—which must be taken in conjunction with that part of the rule which seeks to set aside the verdict as being against evidence, for the two are so intertwined that they must stand or fall together,—I have carefully attended to the observations of the defendant's counsel and to the report of the learned Judge, and I find no fault with the way in which the case was presented \*416] to the jury. I think there was evidence of the existence of an \*immemorial highway which the learned Judge was bound to leave to the jury. There was, it is true, a good deal of evidence of dedication within living memory: but there was also evidence of an ancient highway, which could not be withdrawn from the consideration of the jury. I find no such clear miscarriage in the way in which the matter was left as to justify me in dissenting from it: there was evidence on both sides: and the learned Judge reports to us that he is not dissatisfied with the verdict. As between these parties, no doubt, the verdict is conclusive that the highway adjoining *usque ad medium filum* is part of the 100 acres: but it is not conclusive as to anything beyond. It would certainly be admissible and strong evidence of a public highway along the whole line; but still it would be capable of being rebutted, if claimed to be used as evidence of a highway in any other part than that immediately in question in this cause.

WILLIAMS, J.—I am of the same opinion; and I will only add a word as to the point of law arising on the first count of the declaration. In the case of *The Marquis of Salisbury v. The Great Northern Railway Company*, which has been referred to, there was enough on the face of the conveyance which was set out in the special case to show that a moiety of the adjoining highway was not intended to pass. That case, therefore, is out of the general rule, which I take to be this,—that a conveyance of a piece of land to which belongs a moiety of an adjoining highway, passes the moiety of the highway by the general description of the piece of land. There is nothing in the present case to take it out of that general rule.

WILLES, J., and KEATING, J., concurred.

Rule discharged.

## CASES

**ARGUED AND DETERMINED**

**ON THE**

COURT OF COMMON PLEAS,

IN

Trinity Term,

**IN TEL**

**TWENTY-FOURTH YEAR OF THE REIGN OF VICTORIA.**

The Judges who usually sat in banc in this term, were,—

ERLE, C. J.	WILLES, J.
WILLIAMS, J.	BYLES, J.

**WILLIAMS and Another v. ALLSUP. June 3.**

The mortgagor of a ship, who remains in the ostensible ownership, has an implied authority to confer a right of lien for repairs necessary to keep her seaworthy,—notwithstanding the 70th section of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), which enacts that “a mortgagee shall not by reason of his mortgage be deemed to be the owner of a ship, or any share therein, nor shall the mortgagor be deemed to have ceased to be owner of such mortgaged ship or share, except in so far as may be necessary for making such ship or share available as a security for the mortgage-debt.

THIS action was brought to recover the value of a steamboat; and by consent of the parties, under a Judge's order, the following case was stated for the opinion of the Court,—it being agreed that the action \*was to be considered as an action of trover; the defendant also agreeing to admit a demand and a refusal to deliver before action [\*418 brought:—

In the year 1856, the plaintiffs, who were bankers at Chester, advanced to Mr. William Hilliar, of Eastham, in the county of Chester, the sum of 935*l.* 2*s.*, and, as a security for the repayment thereof and of any further advances, the said William Hilliar executed to the plaintiffs on the 1st of October, 1856, a mortgage of a steamboat called the Loch Lomond, of which he was then the owner, having been duly registered

as such on the register at the Custom House in Liverpool. The said mortgage was in the form prescribed by the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, and was duly recorded by the plaintiffs at the Custom House at Liverpool on the 2d of October, 1856. A copy of the mortgage,—see opposite,—was annexed to and was to form part of the case.

The plaintiffs never took or had possession of the said steamboat, or in any way interfered with the management or use of her, or gave any orders respecting her; but she remained, with the knowledge and sanction of the plaintiffs, in the possession and under the control of the said William Hilliar, who, with the knowledge and sanction of the plaintiffs, used, worked, and navigated the said steamboat.

In November, 1860, the said William Hilliar was indebted to the plaintiffs on his account current in the sum of 1268*l.* 13*s.* 1*d.*, with an arrear of interest thereon.

At that time the said William Hilliar communicated to the plaintiffs the fact that he was in pecuniary difficulties, and would shortly be compelled to suspend payment; and the plaintiffs then for the first time learnt, from the information of the said William Hilliar, that the said \*420] steamboat then was, and for \*some months had been, in the possession of the defendant, who was a shipbuilder at Preston, in the county of Lancaster.

In April, 1860, the said steamboat being very much out of repair, and in want of needful and necessary repairs, and in fact having been condemned as unseaworthy by the government surveyor, who had refused to renew her certificate to enable her to be used and navigated,—but of which facts the plaintiffs were ignorant,—the said William Hilliar delivered her to the defendant, who then was and still is a shipwright carrying on his trade at Preston, in order and for the purpose of the said steamboat being repaired by the defendant in the way of his trade as such shipwright.

The defendant accordingly, in pursuance of the request of the said William Hilliar, proceeded to repair the steamboat, and did work and repairs upon her to the amount of 870*l.* 8*s.* 10*d.*, by which she was greatly improved in value.

The ordering of such repairs was a prudent and reasonable course for the said William Hilliar to pursue: and such repairs were reasonable and necessary, and no more than were necessary, in order to enable the said steamboat to be used and navigated in the ordinary way; and, without such repairs, she was not seaworthy, or in a condition or fit to be used or navigated.

The said steamboat remained in the possession of the defendant for the purpose of having such repairs executed, from the time she was so delivered to him as aforesaid down to the commencement of the suit: and the amount of such repairs was due to the defendant at the commencement of this suit, and when the said steamboat was demanded from the defendant as hereinafter mentioned.

\*421] The plaintiffs afterwards demanded the steamboat \*from the defendant, but he refused and still refuses to deliver her to them until his bill for the said repairs is paid.

On the 8th of January, 1861, the said William Hilliard was duly adjudicated a bankrupt, on his own petition.

**MORTGAGE** (to secure Account Current, etc.)

Official Number of Ship, 16863.

Name of Ship, Loch Lomond.

Port number, 162.	British or foreign built, British.	How propelled, Paddle.	Where built, Dartmouth.	When built, 1844.
Number of decks . . . one.	Build . . . . . clinker.	Measurements, under 8 & 9 Vols. c. 89 { Length from the forepart of the stem under the bowsprit to the aft side of the head of the stern-post, 126 feet. Main breadth to outside of plank, 16 feet, 3 tenths. Depth in hold from tonnage deck to ceiling at midships, 6 feet, 7 tenths.		
Number of masts . . . one.	Galleries . . . . none.			
Rigged . . . . . smack, with no bowsprit.	Head . . . . . none.			
Bern . . . . . square.	Framework . . . . iron.			

Tonnage.		No. of Tons.
Tonnage under deck . . . . .		
Closed-in spaces above the tonnage deck, if any; viz. spaces or spaces between decks . . . . .		
Poop . . . . .		
Round-house . . . . .		
Other enclosed spaces (if any) naming them . . . . .		
Deduct allowance for propelling power . . . . .		
Register tonnage . . . . .	60 3/8	

		No. of Tons.
Deduction for space required for propelling power . . . . .		38 4/8
Length of engine-room (if measured), 32 feet, 6 inches.		
Number of engines . . . . .		
Combined power (estimated horse-power) . . . . .		

[illegible]

In witness whereof I have herein subscribed my name and affixed my seal this first day of October 1864.  
 Attested by the above-named William Miller, in the presence of A. J.  
 Entered 2d October, 1865, at 10½ A. M., J. Maithie, Registrar, Port of Liverpool.

**WILLIAM FIDELLAS**

(d) Were state by way of retinal claim there be an account current between the mortgagee (mortgaging him) and the mortgagee (mortgaging him) and therefore the nature of the transaction, so as to show how the interest of principal and interest due at any given time to be ascertained, and the manner and time of payment.

(e) If any prior mortgage, held, ' were an express by the mortgagee and the mortgagee.

The question for the opinion of the Court was, whether the plaintiffs were entitled to recover in this action. If the Court should be of opinion in the affirmative, a verdict was to be entered for the plaintiffs for 1500*l.*, with costs: if in the negative, a verdict was to be entered for the defendant, with costs. And it was further agreed, that, if the verdict were entered for the plaintiffs, it should be vacated on the defendants' giving up the steamboat to the plaintiffs and paying their costs; and that, if it were entered for the defendant, it should be so entered with costs, or the said steamboat should be given up to the plaintiffs, on payment by them to the defendant of 870*l.* 8*s.* 10*d.* and costs.

*Welsby*, for the plaintiffs.(a)—The defendant had no lien upon the ship for the repairs ordered by the mortgagor, as against the plaintiffs, the mortgagees. The position of the mortgagee is defined by the 70th section of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), which enacts that "a mortgagee shall not by reason of his mortgage be deemed to be the owner of a ship or any share therein, nor shall the mortgagor be deemed to have ceased to be the owner of such mortgaged \*422] ship or share, except in so far as may be \*necessary for making such ship or share available as a security for the mortgage-debt." The 66th, 67th, and 69th sections provide for the mortgage of ships, the registration of such transactions, and their priority. It is plain, that, if the mortgagor may without the knowledge of the mortgagee create a lien on the ship for repairs, the security of the mortgagee will be materially prejudiced and rendered less available. [BYLES, J.—Does the mortgage appear on the certificate of registry?] Not of necessity: but parties dealing with the owner cannot be prejudiced by the mortgage, seeing that, to be of any avail, it must be registered, and that by s. 92, the register is open to inspection by any person on payment of a small fee. In *Dickenson*, app., *Kitchen*, resp., 8 Ad. & E. 789 (E. C. L. R. vol. 35), the claimant, upon an interpleader summons in the County Court as to his alleged title to a ship seized in execution upon a judgment against the registered owner, proved a previous mortgage of the ship to him by such owner for a loan, with a proviso in the mortgage postponing until a date subsequent to the seizure of the ship the power of sale vested in the mortgagee by s. 71 of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), and that such mortgage was recorded in the register-book of the port of the ship's registration in the form prescribed by s. 66 of the same statute; but it also appeared that there was no endorsement made on the certificate of registry according to the requirements of the 4 G. 4, c. 41, ss. 35, 43, and of the 3 & 4 W. 4, c. 55, ss. 34, 42. Upon appeal to the Court of Queen's Bench, it was held that the mortgage was not invalid, either as a fraud against creditors, or as not being according to the Merchant Shipping Act, 1854, on the ground of the postponement of the power of sale; and that, even if the registration of the mortgage was imperfect by reason of the want \*423] of the endorsement on the \*certificate, yet a judgment given by the County Court upon the interpleader against the claimant in favour of the execution-creditor was erroneous, for, the claimant became and was the owner of the ship by reason of the mortgage, and such common law incident to a mortgage is not abrogated by s. 70 of the Merchant Shipping Act, 1854, which was intended to protect a mort-

(a) The points marked for argument on the part of the plaintiffs were as follows:—"That, upon the facts stated in the special case, the defendant had not any lien upon the steamboat as against the plaintiffs, and that the plaintiffs were entitled to recover the same in trover."

gagee taking possession of a mortgaged ship in order to make it available as a security, from liabilities that might otherwise attach upon him as owner of a ship in possession. The construction put upon the 70th section by Lord Campbell, in his judgment, is as follows:—"The true meaning and intention of the earlier part is, to protect a mortgagee in doing acts necessary to make the ship available as a security for his debt. To make the ship so available, he may take possession of her and collect the freight; and yet, by the earlier part of the section, he is protected from liabilities, such as the debts of the ship, which might otherwise be urged against him as the legal owner in possession receiving a beneficial interest. There is nothing in the Act to enable a creditor of the mortgagor to seize and sell a mortgaged ship: and the exercise of such a right by him is inconsistent with the right expressly retained in favour of the mortgagee." Upon the authority, therefore, of that case and the 70th section of the Merchant Shipping Act, it is submitted that the mortgagees still remain owners of the ship, with all the protection given to them by that section, and the defendant's claim cannot be sustained.

*Mellish*, Q. C. (with whom was *Quain*), contra.—The question in this case does not depend upon the construction of the Merchant Shipping Act, 1854. The lien of a tradesman who has done repairs upon a ship \*or any other chattel is by the common law available against all [\*424 who actually or impliedly assented to the thing being deposited with him for repair. Here, the vessel had been allowed to continue in the possession of the mortgagor for more than two years. From the nature of the transaction, and the necessity of the case, the mortgagees must be assumed to have impliedly licensed the mortgagor to get the ship repaired whenever and wherever repairs were required to keep her in a condition to be available to earn freight for the discharge of the mortgage-debt. The Merchant Shipping Act never could have meant to give the mortgagees rights over the ship free from an engagement such as this. Every maritime lien is good against a mortgagee; as, where the master has been obliged to execute a bottomry-bond; so, where the ship runs down another; or where necessary repairs are done in a foreign port; so, in the case of seamen's wages: for all these the ship is bound. In the case of *The Wataga*, 1 Swabey's Adm. R. 165, an American ship supplied with necessaries at the Cape of Good Hope by an English firm having an establishment there, on her arrival in the port of London was arrested at the suit of the merchant who supplied the necessaries, and, with the consent of the owner, sold. Payment to him out of the proceeds was opposed by the mortgagees of the vessel; but the Court held, that, under the 6th section of the 3 & 4 Vict. c. 65, it had jurisdiction on a claim for necessaries supplied to a foreign vessel in colonial as well as British ports, and decreed payment accordingly. To hold that the defendant had not a lien, would be to make his labour and materials expended upon the ship a security for the mortgage-debt. Particular liens have always been much favoured in law: the real owner of a chattel can never evade a lien by authorizing another person to get it repaired. \*No case can be found directly in point: but, in [\*425 principle, the right of lien must exist here. It is said that the shipwright sustains no inconvenience, because he may ascertain before he undertakes the repairs, by inspecting the register, whether the ship

has been mortgaged or not. But the answer to that is obvious: there is no section in the Merchant Shipping Act which makes the registration of a mortgage obligatory; the only consequence of the omission to register being that pointed out by s. 69, viz. that the mortgagee loses priority. No injustice is done to the mortgagees here: for, the case finds that the vessel could not have been available unless repaired; and she is improved to the full value of the repairs done.

*Welsby*, in reply.—This is not the case of a maritime lien, but of a lien at common law arising out of contract, which can be good only as between the contracting parties and those claiming under them. The case does not find that the plaintiffs had any notice or knowledge that the ship was unseaworthy or wanted repair. To hold them liable in this way will clearly be a violation of the 70th section of the Merchant Shipping Act, 1854.

ERLE, C. J.—This is an action by the mortgagee of a steam-vessel against a shipwright who had done certain repairs on the vessel at the request of the mortgagor, who had been allowed to be in the possession and apparent ownership. The defendant claims a lien upon the ship for the price of these repairs: and I am of opinion that that claim is well founded. There is, it seems, no authority to be found bearing upon the question, though I presume it must have arisen many times. I should rather expect that it had never been made the subject of litigation because the right of lien has \*always been admitted to \*426] attach. I put my decision on the ground suggested by Mr. *Mellish*, viz., that the mortgagee having allowed the mortgagor to continue in the apparent ownership of the vessel, making it a source of profit and a means of earning wherewithal to pay off the mortgage-debt, the relation so created by implication entitles the mortgagor to do all that may be necessary to keep her in an efficient state for that purpose. The case states that the vessel had been condemned as unseaworthy by the government surveyor, and so was in a condition to be utterly unable to earn freight or be an available security or any source of profit at all. Under these circumstances, the mortgagor did that which was obviously for the advantage of all parties interested: he puts her into the hands of the defendant to be repaired; and, according to all ordinary usage, the defendant ought to have a right of lien on the ship, so that those who are interested in the ship, and who will be benefited by the repairs, should not be allowed to take her out of his hands without paying for them. The 70th section of the Merchant Shipping Act, 17 & 18 Vict. c. 104, does not appear to me at all to interfere with this view. It does not to my mind establish the right of the mortgagee to the possession of the ship, or negative the lien of the person doing the repairs. That section enacts that “a mortgagee shall not by reason of his mortgage be deemed to be the owner of a ship or any share therein, nor shall the mortgagor be deemed to have ceased to be the owner of such mortgaged ship or share, except in so far as may be necessary for making such ship or share available as a security for the mortgage-debt.” The implication upon which I found my judgment is quite consistent with that provision. The vessel has been kept in a state to be available as a security to the \*427] mortgagee, by her destruction \*being prevented by the repairs which the defendant has done to her. I think there is nothing in the 92d section to affect this question. There is, no doubt, some

difficulty in the case. But it is to be observed that the money expended in repairs adds to the value of the ship; and, looking to the rights and interests of the parties generally, it cannot be doubted that it is much to the advantage of the mortgagee that the mortgagor should be held to have power to confer a right of lien on the ship for repairs necessary to keep her seaworthy. For these reasons, I am of opinion that the defendant is entitled to judgment.

WILLES, J.(a)—I am of the same opinion. The mortgagees have taken a property in the vessel for the purpose of securing money advanced by them. By the permission of the mortgagees the mortgagor has the use of the vessel. He has, therefore, a right to use her in the way in which vessels are ordinarily used. Upon the facts which appear on this case, this vessel could not be so used unless these repairs had been done to her. The state of things, therefore, seems to involve the right of the mortgagor to get the vessel repaired,—not on the credit of the mortgagees, but upon the ordinary terms, subject to the shipwright's lien. It seems to me that the case is the same as if the mortgagees had been present when the order for the repairs was given. To that extent I think the property of the mortgagees is impliedly modified.

BYLES, J.—I am of the same opinion. At common law, independently of the Merchant Shipping Act, 1854, the shipwright would have a lien on the ship for the repairs: and I see nothing in that Act to deprive [\*428] him of that right. The mortgagees have permitted the mortgagor to be in the uncontrolled possession of the vessel: and it should seem to have been a mortgage for an uncertain and undefined period. Now, as it is obvious that every ship will from time to time require repairs, it seems but reasonable under circumstances like these to infer that the mortgagor had authority from the mortgagees to cause such repairs as should become necessary to be done upon the usual and ordinary terms. Now, what are the usual and ordinary terms? Why, that the person by whom the repairs are ordered should alone be liable personally, but that the shipwright should have a lien upon the ship for the work and labour he has expended on her. Nor are the mortgagees at all prejudicially affected thereby. They have a property augmented in value by the amount of the repairs. That being so, without reference to the Merchant Shipping Act, it seems to me that the claim of the defendant here is well founded. It certainly does seem very extraordinary that this point has not been raised before. The true reason probably is that suggested by my Lord.

Judgment for the defendant.

(a) Williams, J., was engaged in the Divorce Court.

**\*429]** **\*RICHARD TAYLOR, Appellant; RICHARD HUMPHREYS, Respondent. June 5.**

A man who goes to a place a short distance from his home for the mere purpose of taking refreshment is not a "traveller" within the meaning of the exception in the 18 & 19 Vict. c. 118, s. 2: but one who goes to an inn for refreshment in the course of a journey, whether of business or of pleasure, and whether on foot or otherwise, is a "traveller" within the statute.

THE following case was stated for the opinion of this Court, pursuant to the 20 & 21 Vict. c. 43:—

Richard Taylor, a licensed victualler carrying on business at a place called Alcester Lane's End, appeared before, &c., three of Her Majesty's justices of the peace for the county, in answer to an information under the 18 & 19 Vict. c. 118, s. 2, charging him with having, on Sunday, the 24th of March then last, at the parish of King's Norton, in the said county, and otherwise than to a traveller or lodger therein, kept open his house and premises for the sale of wines, spirits, beer, and other fermented and distilled liquors, between three and five o'clock in the afternoon, contrary to the statute in that case made and provided.

It was proved, that, at a quarter past four o'clock in the afternoon of the day mentioned in the information, five men were in the house of the defendant drinking ale and smoking; that one of them was the driver and another the conductor of a public omnibus which runs several times daily from Birmingham to the defendant's house, and back, plying for passengers on its way, and which had been driven there that afternoon, as usual; that the other three persons had walked from Birmingham that afternoon, and called at the defendant's house, a distance of four miles, and afterwards returned thence to Birmingham, two by the omnibus, and the third on foot; that the defendant asked these persons if they were travellers, and admitted them on receiving answers in the affirmative.

**\*430]** The defendant contended that the five men, having \*come a distance of four miles from their homes, were travellers within the meaning of the statute, whether for business or for pleasure.

The justices, however, considered that the three men not connected with the omnibus, having merely walked the above-mentioned distance from their homes for amusement or exercise, were not travellers within the meaning of the statute, and that it was not the intention of the legislature to throw open public-houses on Sunday to persons living within a few miles, and who might choose to walk or ride there for pleasure: and they fined the defendant in the mitigated penalty of 1s. and costs.

*Hayes, Serjt., for the appellant.*—The conviction took place on the 18 & 19 Vict. c. 118, s. 2, which enacts that "it shall not be lawful for any licensed victualler, or person licensed to sell beer by retail, to be drunk on the premises or not to be drunk on the premises, or any person licensed or authorized to sell any fermented or distilled liquors,—or any person who by reason of the freedom of the mystery or craft of vintners of the city of London, or of any right or privilege, shall claim to be entitled to sell wine by retail to be drunk or consumed on the premises,—in any part of England or Wales, to open or keep open his house for the sale of or to sell beer, wine, spirits, or any other fermented or dis

illed liquor, between the hours of three and five o'clock in the afternoon, nor after eleven o'clock in the afternoon, on Sunday, or on Christmas-Day, Good Friday, or any day appointed for a public fast or thanksgiving, or before four o'clock in the morning of the day following such Sunday, Christmas-Day, Good Friday, or such days of public fast or thanksgiving,—*except to a traveller or lodger therein.*" The question is, whether the three persons who had walked from \*Birmingham [\*431 to the defendant's house,—a distance of four miles,—were not travellers within the meaning of the above statute. The difficulty imposed upon an innkeeper by this sort of legislation is very great. He has no means of knowing who the parties are who come and demand rest and refreshment: if he refuses to open his door to a traveller, he subjects himself to the risk of an indictment (*Rex v. Ivens*, 7 C. & P. 213 (E. C. L. R. vol. 32)): and it is no defence for him to say that the party came within the prohibited hours, travelling on Sunday not being illegal: *Sandiman v. Breach*, 7 B. & C. 96 (E. C. L. R. vol. 14), 9 D. & R. 796 (E. C. L. R. vol. 16). [BYLES, J.—Not only is it not illegal to travel on a Sunday; but, on the contrary, the Sunday traveller seems to be an especial favourite with the legislature: he is to be refreshed.] In *Atkinson, app., Sellers, resp.*, 5 C. B., N. S. 442 (E. C. L. R. vol. 94), the Court held, that, to constitute a "traveller" within this statute, it is not necessary that the party should be journeying *on business*. In that case, the distance the parties were from their place of residence, Liverpool, was five miles and a half. Cockburn, C. J., there says: "Of course, a man could not be said to be a traveller who goes to a place merely for the purpose of taking refreshment. But, if he goes to an inn for refreshment in the course of a journey, whether of business or of pleasure, he is entitled to demand refreshment, and the innkeeper is justified in supplying it." The magistrates here act upon that authority in the case of the driver and conductor of the omnibus, but not in the case of the three persons who had *walked* to the appellant's house. That, it is submitted, is a very unsound distinction. [ERLE, C. J.—The magistrates hold the driver and conductor to be travellers because travelling is their vocation.] A man who rides less needs refreshment than he who travels on foot. Is it reasonable to make a distinction \*between one who can and one who cannot [\*432. afford to ride?

*David Keane, contra.*—In the case of *Atkinson, app., Sellers, resp.*, it is found that the parties had left Liverpool about two o'clock in the afternoon, for pleasure, in a vehicle, and had driven a round of eight to ten miles before arriving at Garston; and that they drove their horses and vehicles into the appellant's stable-yard, and ordered meal and water for the horses, and then themselves went into the house for refreshments: and all that the Court were asked to determine, was, whether under these circumstances, the magistrates were *bound to convict*. Here, however, it is stated that these persons went into the appellant's house for the purpose of smoking and drinking. Now, though drinking may be necessary refreshment, smoking is not. It is submitted that the magistrates properly drew a distinction between those whose necessary labour rendered refreshment desirable, and the others, as to whom they find, that, having merely walked the distance of four miles from their homes for amusement or exercise, they were not travellers

within the meaning of the statute, and that it was not the intention of the legislature to throw open public-houses on Sundays to persons living within a few miles, and who might choose to walk or ride there for pastime. [WILLES, J.—That is their reasoning, not their finding.] The object of the legislature was, that, during certain hours on the Sunday, the business of the publican should cease, in order that his servants should have an opportunity of attending the service of their Maker. [ERLE, C. J.—It is the common-law duty of an innkeeper to supply refreshment to travellers. The object of the enactment I take to be this, viz., to prevent the attractions of the public-house from being held \*433] out to allure men from places of worship. I do not think the legislature intended to cast upon the innkeeper the burthen of proving in every case that the party refreshed is really a traveller. Before a man is convicted of the offence here charged, it seems to me that the complainant is bound to establish that he had the purpose of entertaining a person who was not a traveller. I cannot think the innkeeper would be guilty of any offence within this statute if he entertained his next-door neighbour, provided he came disguised as a traveller.] The statute distinctly prohibits the licensed victualler from keeping open his house or supplying refreshments during the hours named: then comes an exception in favour of a “traveller” or a “lodger.” This clearly did not mean to apply to persons who say they are travellers; otherwise, every publican in the most populous part of the lowest neighbourhoods of London might protect themselves from the consequences of a violation of the statute by merely asking the question of each applicant for refreshment. [ERLE, C. J.—I think an answer in the affirmative would justify him in supplying the required refreshment, provided the party was a traveller.] To satisfy the word “traveller,” the person presenting himself must be one who in passing, it may be on foot, from one place to another, is overcome by the want of refreshment. Unless the Court are satisfied that the magistrates were wrong in convicting the appellant, they will not interfere.

*Hayes, Serjt., in reply.*—No real distinction has been or can be suggested between the case of *Atkinson, app., Sellers, resp.*, and the present case. It is somewhat difficult to draw the line. Business clearly is not the true test. Then, what distance constitutes the party \*434] a traveller? In the case above mentioned the distance was five miles and a half from the homes of the travellers, and they were riding. Here, the distance is four miles, and the parties were walking. The better test probably would be, whether the party demanding refreshment, whether he came there on foot or otherwise, was a stranger.

ERLE, C. J.—This is an appeal against a conviction of a licensed victualler for having, contrary to the statute 18 & 19 Vict. c. 118, s. 2, kept open his house for the sale of fermented liquor between the hours of three and five o'clock on Sunday afternoon, and supplying refreshment to persons other than travellers. Now, I am extremely desirous of giving effect to the intention of the legislature, which was, to prevent publicans from keeping open their houses during the hours of Divine service, and also of giving effect to the intention of the magistrates in endeavouring to prevent persons who are not travellers resorting to houses of entertainment at a short distance from their own homes for

the mere purpose of procuring drink. But, however desirous I may be to carry out these laudable intentions, I am unable to arrive at any other conclusion than that the facts stated in this case do not authorize the conviction. It appears that the three individuals who are charged to have been improperly supplied with refreshment had walked from Birmingham, a distance of four miles. Now, whether they walked that distance on business, for the purpose, for instance, of visiting a sick relative, or for pleasure, I do not think the legislature intended that they should be precluded from demanding, or the innkeeper be precluded from furnishing them with, necessary refreshment. In so deciding, I think we give effect to the decision of this Court in *Atkinson, app., Sellers, resp.*, where the Court in substance say, that a man \*who goes to a place at a short distance from his home merely for the purpose of taking refreshment cannot be said to be a traveller; but that, if he goes to an inn for refreshment in the course of a journey, whether of business or of pleasure, he does come within the meaning of the word traveller. Although the Court there complain of the use of an ambiguous word, I think it is impossible to mistake the tenor of that judgment. For these reasons, I am of opinion that the appeal should be allowed.

The rest of the Court concurring,

Appeal allowed.

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ARTHUR WELLINGTON BEER, Appellant; JAMES SANTER,  
Respondent. *June 5.*

An agricultural lease contained a covenant on the part of the lessor, his heirs, &c., that he and they would "drain with proper drain-tiles, one rod apart, ten acres of the lands now in rye-grass, at his and their costs, except the carriage of the said drain-pipes, which is to be borne and paid by the lessee; and will drain the remainder of the lands hereby demised, in manner aforesaid, upon being paid a further yearly rent of 5*l.* for every 100*l.* so expended:—

Held, that the words "in manner aforesaid" referred only to the mode of performing the work, viz. placing the drain-tiles one rod apart; and consequently that the tenant was not chargeable with the expense of carriage of the drain-pipes beyond the first ten acres.

THE plaintiff in this action in the County Court of Kent holden at Tonbridge, claimed 26*l.* 13*s.* 6*d.*, including a claim of 13*l.* 15*s.* 1*d.* for carriage of drain-pipes, which is the subject of this appeal. The said claim depends upon the construction of a lease by the defendant to the plaintiff, of which the following is a copy:—

"This indenture, made the 26th day of August, 1859, between James Santer, of, &c., of the one part, \*and Arthur Wellington Beer, of, &c., of the other part, Witnesseth, that, in consideration of the rents, covenants, and agreements hereinafter reserved and contained on the part of the said A. W. Beer to be paid, kept, and performed, he the said J. Santer doth by these presents demise and lease unto the said A. W. Beer, his executors, administrators, and assigns, all that messuage or tenement and farm-house situate and being in the parish of Tonbridge, in the county of Kent, called Cold Harbour Park Farm, with all those three cottages, and all those several pieces or parcels of land, arable, pasture, hedge-rows, and hop-land now used with the said messuage or tenement, containing by estimation eighty acres or thereabouts, and now or late in the occupation of the said James Santer; and all rights,

privileges, members, and appurtenances to the same premises belonging, including the exclusive right of shooting, sporting, and taking of game on the said lands and the woodlands, except the ten acres called Horn's Lodge field adjoining thereto (excepting unto the said James Santer, his heirs and assigns, all timber and timber-like trees now or hereafter growing upon the said demised premises, and also free liberty for him and them, with workmen and others, at all reasonable times, with horses, carts, and carriages, to fell, cut down, square, saw, and carry away the same, and to enter, pass, and repass, into, upon, and from the said demised premises, compensation being paid for any damage done to the corn, grain, or seeds growing on the same:) To have and to hold the said messuage or tenement, farm, lands, and premises hereby demised, with the appurtenances (except as before excepted), unto the said A. W. Beer, his executors, administrators, and assigns, from the 11th day of October next, for the term of seven years thence next ensuing, Yielding and paying therefor yearly during \*437] the said term the yearly rent or sum of 150*l.*, by equal half-yearly payments, on the 6th day of April and the 11th day of October in each year, clear of all deductions (except for land-tax, property or income tax, and quit-rent): And the said A. W. Beer, for himself, his heirs, executors, and administrators, doth hereby covenant, promise, and agree to and with the said James Santer, his heirs and assigns, that he the said A. W. Beer, his executors, administrators, or assigns, shall and will pay or cause to be paid unto the said J. Santer, his heirs and assigns, the said rent of 150*l.* hereby reserved, on the days and in manner hereinbefore mentioned for payment thereof: and also that he the said A. W. Beer, his executors, administrators, and assigns, shall and will at all times during the said term pay and discharge all taxes, rates, duties, and assessments at any time during the said term imposed on the said premises (except land-tax, property or income tax, and quit-rents); and also shall and will from time to time and at all times during this demise well and sufficiently repair the premises hereby demised (damage by fire or tempest excepted), and also fetch and bring to the said demised premises all such materials necessary for the repair of the premises, from any distance not exceeding five miles therefrom; and the said messuage and premises hereby demised, and every part thereof, being so repaired, shall and will at the end or other sooner determination of the said term peaceably leave and yield up, damage by fire or tempest excepted; and also shall and will purchase, bestow, and bring upon the said lands one load of good manure for every ton of hay or clover sold off the said premises; and also shall and will leave one-third of the arable land hereby demised fallow, or in pea or bean stubble at the end of the said term; and also shall and will \*438] at all times during the said term \*manage and cultivate the said lands in a good and husband-like manner, except that the said A. W. Beer, his executors, administrators, or assigns, shall be at liberty to break up any of the pasture-land hereby demised, without compensation or increased rent therefor; and also that it shall be lawful for the said J. Santer, his heirs or assigns, with workmen and others, to enter upon the said premises twice or oftener in every year of the said term, to view the state of repair and condition thereof, and to do all such painting and repairs as he or they may have occasion to do: Provided

always, that, if the said yearly rent or any part thereof shall be in arrear and unpaid by the space of thirty days next over or after either of the days on which the same ought to be paid as aforesaid, or if the said A. W. Beer, his executors or administrators, shall become bankrupt or insolvent, or shall fail to observe and perform any or either of the covenants hereinbefore contained, then and in any or either of the said cases it shall be lawful for the said J. Santer, his heirs or assigns, to re-enter into and upon the said demised premises, or any part thereof in the name of the whole, and to repossess and enjoy the same as in his or their former estate: And the said J. Santer, for himself, his heirs, executors, and administrators, hereby covenants with the said A. W. Beer, his executors, administrators, and assigns, that he the said J. Santer shall and will repair all the buildings, gates, fences, and hedges, and paint and tar the same whenever required before the 11th day of October next; and also shall and will grub in a proper manner all the hedge-rows belonging to the premises when required by the said A. W. Beer, his executors, administrators, or assigns; and also that he will pay and bear all tithes and rent-charge in lieu of tithes chargeable during the said term on the said land and premises (except the \*extra tithe [\*439 rent-charge on hops); and also that he will paint the external part of the said messuage, with the buildings and cottages on the said farm, and all the gates and fences, twice during the said term, or oftener if required by the said A. W. Beer, his executors, administrators, or assigns; and also shall and will build at his own costs an oast-house, if required by the said A. W. Beer, his executors, administrators, or assigns, on some convenient part of the premises, upon condition that the said A. W. Beer, his executors, administrators, or assigns, do plant about two acres of the said land with hops; *and also that he and they will drain with proper drain-tiles one rod apart ten acres of the lands now in rye-grass, at his and their costs, except the carriage of the said drain-pipes, which is to be borne and paid by the said A. W. Beer; and will drain the remainder of the lands hereby demised in manner aforesaid, upon being paid a further yearly rent of 5*l.* for every 100*l.* so expended, and so in proportion for any less sum expended, and which the said A. W. Beer hereby agrees to pay accordingly from the time of such draining; and also that the said J. Santer, his heirs or assigns, shall and will find and provide all such materials as may be necessary for repairs, and all rough timber, within five miles of the said premises, and will pay half part of the labour on such timber and repairs, the lessee paying the other half part; and also that he the said J. Santer, his heirs or assigns, or the succeeding tenant, shall and will take and pay for, to the said A. W. Beer, his executors, administrators, or assigns, the growing crops, and all hay, clover, straw, and manure, at sale prices, household furniture, live and dead stock, and all machinery necessary for carrying on a farm of eighty acres that shall be erected by the said A. W. Beer on the said premises, and effects, which shall be in, upon, and about the said messuage, \*lands and premises at [\*440 the expiration of the said term, at a fair valuation thereof to be made in the usual way by two valuers, one to be chosen by each party, or, in the event of their differing, then by a third person to be chosen by such valuers: Provided also, that, in the event of the said James Santer, his heirs or assigns, being desirous of putting an end to*

this demise, as far as it affects part of the said lands called Horn's Lodge Field, containing about ten acres, at the end of the first five years of the said term, it shall be lawful for him or them so to do, upon giving to the said A. W. Beer, his executors, administrators, or assigns, notice of such desire at any time, and thereupon a reduction of 20s per acre shall be made from the said rent of 150l.: Provided also, that, if the said A. W. Beer, his executors, administrators, or assigns, shall be desirous of putting an end to this demise at the end of the first three or five years of the said term of seven years, it shall be lawful for him and them so to do, upon giving to the said James Santer, his heirs or assigns, six calendar months' notice in writing of such desire, whereupon this demise shall cease, determine, and be at an end as if by effluxion of time, anything to the contrary notwithstanding."

This lease was duly executed by the plaintiff and the defendant; and, in pursuance thereof, both the land described in the lease as "ten acres of the said lands now in rye-grass" (hereinafter called the said ten acres), and other land so demised, were drained by the defendant.

The plaintiff did the carriage of the drain-pipes used in the drainage of all the lands so drained.

The plaintiff made no claim for the carriage of the pipes used in the drainage of the said ten acres, but made the said claim of 13l. 15s. 1d. for the carriage of drain-pipes used in the drainage of the other land so drained.

\*441] \*The jury found a verdict for the plaintiff for 23l. 18s. 11d., for the amount of the said claim of 13l. 15s. 1d., and 10l. 3s. 10d. claimed for other causes of action, as to which no question arises, —subject to be reduced to 10l. 3s. 10d. if the Judge thought that the plaintiff was bound to carry drain-pipes for draining the demised land other than the said ten acres.

The learned Judge, being of that opinion, ordered the verdict to be reduced to 10l. 3s. 10d. Against this decision the plaintiff appealed: and the question for the opinion of the Court was, whether the plaintiff or the defendant was bound, on the true construction of the lease, to do or pay for the carriage of drain-pipes for the purpose of draining the demised land other than the said ten acres. If the defendant was so bound, judgment was to be entered for 23l. 18s. 11d.; otherwise the judgment of the County Court was to stand for 10l. 3s. 10d.

*Lush, Q. C.*, for the appellant.—The question turns upon the construction of an agricultural lease, which, amongst other covenants, contains covenants on the part of the lessee to pay rent, taxes, &c., to keep the premises in repair, and also to fetch and bring to the premises all such materials necessary for the repairs of the premises from any distance not exceeding five miles. Then comes a covenant on the part of the lessor, his executors, &c., to repair all the buildings, and paint and tar the same, whenever required, before the 11th of October then next, and a covenant to paint the external part of the messuage, with the buildings and cottages on the farm, &c., twice during the term, or oftener if required by the lessee. Then comes the covenant upon which the question more immediately arises,—*"And also that he and they will*  
 \*442] *drain, with proper drain-tiles, one rod apart, ten acres \*of the*  
*lands now in rye-grass, at his and their costs, except the carriage*  
*of the said drain-pipes, which is to be borne and paid by the lessee:*

and will drain the remainder of the lands hereby demised, *in manner aforesaid*, upon being paid a further yearly rent of 5*l.* for every 100*l.* so expended, and so in proportion for any less sum expended, and which the said lessee hereby agrees to pay accordingly from the time of such draining." Then follows a covenant by the lessor to find and provide all such materials as might be necessary for repairs, and all rough timber, within five miles of the said premises, and to pay half part of the labour on such timber and repairs, the lessee paying the other half part. Taking it all together, the obvious meaning is, that the lessee shall pay nothing towards the drainage of the first ten acres, but that the expense of the carriage of the drain-pipes necessary for that portion of the work shall be borne by him; and that, for the drainage of the remaining portion of the farm, he shall pay an additional rent equal to 5 per cent. upon the outlay. When he pays interest, he is not to find carriage; and when he does find carriage, he is to pay no interest. The words "in manner aforesaid," in the second branch of the drainage covenant, refer to the mode of doing the work, viz., "with proper drain-tiles, one rod apart."

*Byron, contra*.—The words "in manner aforesaid" refer to the whole of the terms of the covenant, including the exception. This would obviously have been the proper construction if the covenant had been shaped, as it is submitted it must, to give it any sensible meaning, be read,—“And also that he and they will drain ten acres of the lands now in rye-grass, with proper drain-tiles, one rod apart, at his and their costs, except the carriage of the said drain-pipes, \*which is to be borne and paid by the lessee.” In that case the “manner aforesaid” would embrace the whole. [\*443]

*Lush*, in reply, was stopped by the Court.

*ERLE, C. J.*—I am of opinion that our judgment must be in favour of the tenant. The covenant which we are called upon to put a construction on is a provision for drainage in an ordinary husbandry lease. The lessor covenants that he, his heirs, &c., “will drain, with proper drain-tiles, one rod apart, ten acres of the lands now in rye-grass, at his and their costs, except the carriage of the said drain-pipes, which is to be borne and paid by the lessee; and will drain the remainder of the lands hereby demised, *in manner aforesaid*, upon being paid a further yearly rent of 5*l.* for every 100*l.* so expended.” The question is, whether the tenant is by this covenant bound to pay for the carriage of the drain-tiles used in the drainage of the rest of the farm beyond the first ten acres. It seems to me that he is not, but that the “manner aforesaid,” as was contended by Mr. *Lush*, refers only to placing the tiles one rod apart.

The rest of the Court concurring,

Decision affirmed, with costs.

\*444] \*ANDREWES v. GARSTIN. *June 5.*

To an action for the breach of an agreement to enter into partnership with the plaintiff, the defendant pleaded, that, before and at the time of the making of the agreement, the plaintiff carried on trade in partnership with one S., which partnership was then about to be wound up and dissolved; that the defendant made the agreement on the faith and under the belief that the plaintiff had up to that time acted with honesty towards his said partner in the conduct of the said business and in relation to the pecuniary affairs thereof; but that, after the making of the agreement and before breach, and before the commencement of the suit, the defendant discovered that the plaintiff had before the time of making the agreement acted with fraud and dishonesty towards his said partner in the conduct of the said business and in relation to the pecuniary affairs thereof, which said fraudulent and dishonest acts of the plaintiff were unknown to the defendant at the time of his entering into the agreement in the declaration mentioned,—wherefore the defendant repudiated and declined to carry into effect the said agreement:—

Held, that this plea afforded no answer to the action.

THE declaration stated, that, theretofore, to wit, on the 6th of November, 1860, by certain articles of agreement then entered into between the defendant of the one part and the plaintiff of the other part, the defendant and the plaintiff did thereby agree to become partners in the trade of furnishing undertakers and job-masters, from the 1st of January, 1861 (which day had passed before this suit), for fourteen years; that a formal deed of partnership should be prepared and executed on or before the said 1st of January, 1861, and in such deed should be inserted such clauses and provisions as should be necessary to carry into effect that agreement, and also all other necessary clauses and provisions usually inserted in deeds of a like nature; that the said deed should be prepared by the solicitors of the plaintiff, and approved of by the solicitors for the defendant; that the plaintiff should covenant to pay the defendant a premium of 1500*l.* on the 1st of January, 1862; in consideration whereof the defendant should assign unto the plaintiff one moiety of the good-will of the undertaking and job-master's business, then carried on by the defendant, at No. 5, Welbeck Street, No. 82, Baker Street, No. 83, Great Portland Street, and No. 28, New Bridge Street, and also one moiety of the shares held by the defendant in the Economic Funeral Company (Limited); that the business should be carried on upon the premises aforesaid, and the partnership should pay rent for

\*445] \*the same to the defendant, such rent to be determined by valuation in the usual way; that the value of the stock and plant on the said 1st of January, 1861, should be determined by valuation in the usual way; that the plaintiff should purchase of the defendant the whole of the stock and plant at the price settled by valuation as aforesaid, and should pay him such price by three equal payments, on the 1st of April, 1861, on the 1st of July, 1861, and on the 1st of October, 1861; that the said stock and plant should be used for the partnership business, and the plaintiff should be credited with the amount paid by him for the same, as capital; that the plaintiff should on the said 1st of January, 1861, pay into the hands of Messrs. Scott & Co., to be the bankers of the said partnership, the sum of 1000*l.* as the cash capital of the said partnership business; that the defendant should not be required to find any capital, except in the manner thereinbefore mentioned; that each partner should be entitled to interest at 5*l.* per centum on his capital for the time being, and should have credit for the same before any divi-

sion of profits took place; that the partners should be entitled to the profits in equal shares; that each partner might draw 125*l.* quarterly on account of his share of profits; that, after the first year, the defendant should not be entitled to draw out of the business any of his profits except the quarterly allowance aforesaid, but the residue of his profits should accumulate in the business, or be paid to the said plaintiff in reduction of his capital, until the capital of each of the said partners should amount to 2500*l.*; that all checks, bills, and notes should be drawn, accepted, made, or endorsed by both of them, the plaintiff and the defendant jointly; that the partnership accounts should be balanced at the end of each half-year of the said term, commencing with the 30th of June next; \*that the death of either partner should deter- [\*446 mine the partnership, but, if the plaintiff should be the survivor, he should be at liberty to occupy the messuages, shops, tenements, stabling, and premises used for the purpose of the partnership business at the death of the defendant, for the period of three calendar months, to be computed from the first usual quarterly day for payment of rent which should first happen after the date of the death of the defendant, at the same rentals as should have been previously paid by the partnership; that the said agreement was subject to the defendant's within fourteen days from the date thereof verifying to the satisfaction of the plaintiff the balance-sheets which had been produced, whereby the net profits of his business from the 1st of January, 1859, to the 31st of August, 1860, were shown to have not been less than at the rate of 3000*l.* per annum; and that the said agreement was also subject to the defendant's within fourteen days from the date thereof (which day had passed before this suit) delivering to the plaintiff a full and true account of all his the said defendant's debts and liabilities, and affording the plaintiff every information thereon, and also satisfying the plaintiff that all such debts and liabilities would and could be discharged in due course: Averment, that the plaintiff was at all times, as the defendant always well knew, ready and willing to perform and fulfil the said agreement on his part: yet, that, although before suit all things had been done and all times had elapsed necessary to entitle the plaintiff to a fulfilment of the said agreement by the defendant on his part, save and except so far as the defendant had prevented and discharged the plaintiff from so doing, the defendant, after the making of the agreement, and before suit, wholly repudiated and rejected the same, and affirmed and declared that he would in no way whatever carry \*out or [\*447 perform the same on his part, and had hitherto neglected and refused, and still neglected and refused, to become partner with the plaintiff in the said trade of furnishing-undertakers and job-masters, on the terms and at the time agreed upon, or on any other terms or at any other time whatever, and had wholly dispensed with the plaintiff's doing anything to carry out the said agreement, to wit, by proffering or tendering to the defendant any such deed as aforesaid, or otherwise: and the plaintiff, by means of the premises, had lost divers great gains and profits which would have accrued to him from the said partnership, and had been otherwise greatly damnified, and had also lost the benefit of moneys paid by him in preparing and carrying out the said agreement on his part, and had been put to expense in endeavouring to procure the performance by the defendant of the aforesaid agreement on his part.

Third plea,—that, before and at the time of the making of the said agreement therein mentioned, the plaintiff then carried on the trade or business of a wholesale iron and tin-plate worker in partnership with one Joseph Spokes, which said partnership at the time of the making of the said agreement was then about to be wound up and dissolved: That he the defendant made the said agreement in the declaration mentioned on the faith and under the belief and supposition that the plaintiff had up to the time of the making of the said agreement acted with honesty towards his said partner in the conduct of the said business which he so then carried on in partnership as aforesaid, and in relation to the pecuniary affairs thereof; but that, after the making of the said agreement in the declaration mentioned, and before any breach thereof by the defendant, and before the commencement of this suit, the defendant discovered that \*the plaintiff had before the making of the said

\*448] agreement from time to time acted with fraud and dishonesty towards his said partner in the conduct of the said business and in relation to the pecuniary affairs thereof, which said fraudulent and dishonest acts of the plaintiff were wholly unknown to the defendant at the time of his making and entering into the said agreement in the declaration mentioned, and from thence up to the time of the discovery thereof as aforesaid: And that, by reason of the premises, the defendant, at the said time when, &c., repudiated and rejected the said agreement, and affirmed and declared that he would in no way whatever carry out or perform the same on his part, and neglected and refused, and still neglected and refused, to become partner with the plaintiff under and according to the terms of the said agreement or otherwise, as he the defendant lawfully might for the said cause in this plea mentioned,—of all which premises the defendant gave due notice to the plaintiff before any breach by him the defendant of the said agreement.

To this plea the plaintiff demurred, the ground of demurrer alleged being that the plea was no answer to the declaration. Joinder.

*Mellish*, Q. C. (with whom was *Prentice*), in support of the demurrer.(a)—The plea is clearly bad. The \*question is, whether

\*449] it is any defence to an action for not carrying out a contract, that the plaintiff had at some former period been guilty of fraudulent or dishonest conduct towards some third party in matters having no reference to the business in hand. [ERLE, C. J.—As a general proposition, there cannot be much doubt about that.] Reliance will no doubt be placed on the case of a contract to marry, which has been held,—

(a) The points marked for argument on the part of the plaintiff were as follows:—

"1. That the plea is bad, because it admits a breach by the defendant of his absolute contract, without offering any valid excuse for such breach:

"2. That, the contract being on the face of it unconditional, the defendant was absolutely bound to fulfil it:

"3. That the plea purports to be founded on a condition which the law does not recognise, and is therefore naught:

"4. That such a condition as the plea assumes to exist can only arise by express agreement between the parties, and no such agreement is shown:

"5. That the defendant, not having protected himself by express provision, must take the consequence of his own omission:

"6. That previous fraud or dishonesty towards third persons, supposing its existence, can be no answer to the action, inasmuch as the law will not presume subsequent fraud or dishonesty:

"7. That the nature and extent of the alleged fraud should have appeared, to enable the Court to judge of its adequacy to annul the contract."

though some learned Judges have even doubted the propriety of that exception,—to be avoided by the concealment of the fact that the woman had been unchaste. But these cases rest on very peculiar grounds: and it would be most serious to apply the principle to other contracts. [ERLE, C. J.—The contract of marriage is subject to some considerations which do not apply to ordinary contracts. WILLES, J.—The plea hardly raises the question: it does not state the nature of the alleged fraudulent conduct, or when it took place.] No: it is as vague and indefinite as can be. Take the case of a returned convict,<sup>(a)</sup> or a \*ticket-of-leave man, or a drunken servant. [BYLES, J.—Or an incompetent workman,—*Harmer v. Cornelius*, 5 C. B. N. S. 236 [\*450 (E. C. L. R. vol. 94).] It would be monstrous to hold that every man who enters into a contract is bound to disclose against himself some circumstance of his former life which has no affinity whatever to the contract, and as to which no inquiry is made.

*Manisty*, Q. C., *contra*.<sup>(a)</sup>—This is a contract which is treated by all jurists as bearing a close analogy to the contract of marriage: it is a contract *uberrimi fidei*. In Collyer on Partnership, 2d edit. p. 117, it is said, that, “mutual confidence in the conduct of a partnership was always inculcated by the civilians. Under the general name of ‘societas,’ they classed both a partnership in trade and a partnership in marriage; and, accordingly, in some countries, the mode of distribution of effects under these two species of connection became the same.” There is obviously no contract in which honesty as to pecuniary transactions and dealings is so essential as in that of \*partnership. Honesty and integrity in an intended partner are as important and indispensable in that relation as is chastity in an intended wife. It is true the plea here does not in terms allege that the plaintiff is still a dishonest person; but, it is submitted, a reputation for dishonesty is never purged, it still stands a permanent and eternal blot. Dr. Story, in his treatise on the law of Partnership, § 6, says: The contract of partnership “is treated by jurists as in its very nature and character a contract arising from and governed by the principles of natural law and justice. Accordingly, it must, in the first place, be founded in good faith and the positive consent of the parties; secondly, it must be for a lawful object and purpose; thirdly, it must be between parties *sui juris* and competent to enter into such a contract. John Voet therefore affirms ‘*Societas est contractus juris gentium, bonæ fidei, consensu constans, super re honestâ, de lucri et damni communione; quam inire possunt omnes liberum habentes rerum suarum administrationem*’ (1 Voet, Comm. ad Dig.,

(a) Recently, in the French Courts, a woman sought to annul her marriage, on the ground of her husband having concealed from her the fact that he had at a former period of his life been a “forçat.” The Cour de Premier Instance declared the marriage void on that ground: but, on appeal to the Cour de Cassation, that judgment was reversed,—the superior Court holding that the concealment of the man’s misfortune did not avoid the contract of marriage.

(b) The points marked for argument on the part of the defendant were as follows:—

“1. That, honesty and belief in the integrity of each partner being the very foundation and essence of a contract of partnership, the contract is necessarily subject to the implied condition that each of the parties thereto is honest and upright in his dealings; and therefore, that, in the present case, the discovery by the defendant before breach of the fraudulent and dishonest character of the plaintiff entitled the defendant to rescind the contract:

“2. That, at all events, the plea affords a good legal defence to the action, as showing a fraudulent suppression by the plaintiff of matter which was the very foundation and essence of the contract, and peculiarly within the plaintiff’s own knowledge.”

Lib. 17, tit. 2, § 1). Hence, if the contract be founded in fraud or imposition either upon one of the parties or upon third persons, it is utterly void." The same learned author, in his treatise on Equity Jurisprudence, § 204, says: "Another class of cases for relief in equity is, where there is undue concealment, or suppressio veri, to the injury or prejudice of another. A suppressio veri is as fatal as a suggestio falsi. It is not every concealment, even of facts material to the interest of a party, which will entitle him to the interposition of a Court of equity. The case must amount to the suppression of facts which one party, under the circumstances, is bound in conscience and duty to disclose to the other party, and in respect to which he cannot innocently be silent." If this is a contract the specific performance of which

\*452] \*a Court of equity would decline to enforce, by reason of a fraudulent concealment, the same facts will afford an answer to an action at law, [BYLES, J.—The plea contains no distinct statement even of a suppressio veri.] Can a man be innocently silent in respect of matter like that suggested? [WILLES, J.—If the allegations in the plea be true, the consequence may be that the plaintiff will recover but small damages: but the question for us here is, whether the plea affords an answer to the action. ERLE, C. J.—There is, no doubt, a general plea of fraud.] There is.

ERLE, C. J.—I am of opinion that the plaintiff is entitled to judgment on this demurrer. The arguments urged so emphatically by Mr. *Manisty* would have been addressed to us with more plausibility if the plea had been a little more specific. There is no suggestion of fraud on the defendant, and as to the rest it is much too vague and uncertain. And I am unwilling to let in a new description of defence to an action for the breach of a contract.

WILLIAMS, J.—I am of the same opinion. There clearly is nothing in the plea to constitute an answer to the action.

The rest of the Court concurring, Judgment for the plaintiff.

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\*453] WILTON v. THE ATLANTIC ROYAL MAIL STEAM-NAVIGATION COMPANY. *May 11.*

The plaintiff took a passage by a ship belonging to the defendants, from New York to Galway, on the terms contained in a passage ticket in which were, amongst others, the following conditions:—

"The ship will not be accountable for luggage, goods, or other description of property, unless bills of lading have been signed therefor."

"Each first and second class adult passenger allowed to have 20 cubic feet of luggage free; but no merchandise, plate, jewellery, precious stones, specie, or bullion will be carried as luggage."

In the course of the voyage, the ship, through the negligence of the captain, was lost, together with the plaintiff's luggage:—Held, that the conditions upon which the defendants received the plaintiff as a passenger absolved them from liability for such loss.

The ticket also contained the following stipulation,—as to the effect of which the Court gave no opinion,—"In case of the loss or detention of the ship during the voyage by any of the accidents of navigation, or by any dangers of the sea, no liability of any kind is to attach to the proprietors."

THIS was an action brought by a passenger to recover damages

against The Atlantic Royal Mail Steam-Navigation Company, for the loss of his luggage through the negligence of their servants.

The first count of the declaration stated that the defendants were owners of a certain steamship called the Argo, for the carriage of passengers and their luggage and of goods and chattels from Galway, in Ireland, to New York, in America, and from New York to Galway, for hire, and were common carriers of goods and passengers for hire in the said ship between the places aforesaid; that the plaintiff became a passenger in and by the said steamship, to be conveyed from New York to Galway, with luggage, goods, and chattels, his property, consisting of, &c., &c., safely and securely to be delivered, &c.: Breach, that, by and through the negligence, &c., of the defendants and their servants, the said ship was lost, together with the plaintiff's said luggage, goods, and chattels; and the plaintiff also lost his passage, &c.

There were also counts for money had and received, and for money due on accounts stated.

The defendants pleaded,—first, to the first count, not guilty,—secondly, to the first count, that the defendants were not common carriers, as alleged,—thirdly, to the first count, that the plaintiff did not \*become, and the defendants did not receive him as, a pass- [\*454  
enger from New York to Galway, with his luggage, &c., to be carried by them the defendants as common carriers, as alleged,—fourthly, to the first count, that the plaintiff was received by the defendants as a passenger, to be carried from New York to Galway, together with his luggage, &c., upon the terms, that, in case of the loss or detention of the said ship during the voyage by any of the accidents of navigation, or by dangers of the sea, no liability of any kind should attach to the defendants; that the vessel was wrecked by accidents of navigation and dangers of the sea; and that the loss of the plaintiff's luggage, &c., and other damages were occasioned by the loss of the ship,—fifthly, to so much of the first count as related to the luggage, goods, chattels, and property therein mentioned, that the plaintiff was received by the defendants into the said ship as a passenger, to wit, an adult first-class passenger, to be conveyed from New York to Galway, with his luggage, &c., upon the terms that the defendants should not be accountable for luggage, goods, or other description of property, unless bills of lading should have been signed for the same, and that each first and second class adult passenger should be allowed to have 20 cubic feet of luggage free, but no merchandise, plate, jewellery, precious stones, specie, or bullion should be carried as luggage; that the said luggage, &c., were delivered by the plaintiff to the defendants and by them received into the ship upon the terms aforesaid, and as the luggage of the plaintiff, without any notice to or knowledge of the defendants that there were among the same any merchandise, plate, jewellery, precious stones, specie, or bullion; that no bills of lading were signed for the said luggage, &c.; and that the same were accidentally lost during the said voyage, by reason and on the \*occasion of the [\*455  
said ship being then wrecked and lost by the dangers of the sea and accidents of navigation,—sixthly, a similar plea as to so much of the declaration as related to certain specific articles therein mentioned, viz., a gold chain, watch, opera-glasses, snuff-box, &c.,—seventhly, to the residue of the declaration, never indebted,—eighthly, except as to

so much of the declaration as related to the goods and chattels, &c., alleged to have been lost, that, after the accruing of the causes of action, the defendants caused and procured the plaintiff at his request to be conveyed as a passenger in and by other ships from Newfoundland to Greenock, in Scotland, free of expense to the plaintiff, and also paid to the plaintiff at Greenock 1*l.* 11*s.* 6*d.*, which said conveyance and payment was by the defendants caused, procured, and made, and by the plaintiff accepted and received, in full satisfaction and discharge of all the causes of action in the declaration mentioned, except as in the introductory part of this plea excepted. Issue.

The cause was tried before Cockburn, C. J., at the last Summer Assizes for Surrey. The facts were as follows:—

On the 20th of June, 1859, the plaintiff took a first-class passage by the defendants' steamship *Argo* from New York to Galway, and upon payment of the passage-money received from their agents at New York a note or ticket of which the following is a copy:—

“Atlantic Royal Mail Steam-Navigation Company.

“Steamship *Argo*, from New York to Galway.

“No. 16.

“June 20, 1859.

“Received from Mr. J. H. Wilton 90 dollars for passage of himself in first cabin, berth No. 20, in steamship *Argo*, sailing June 23d, unless prevented by unforeseen circumstances.

“American Express Company, agents,

“J. M. MURRAY.

\*456] “In case of the loss or detention of the ship during the voyage by any of the accidents of navigation, or by any dangers of the sea, no liability of any kind is to attach to the proprietors.

“The ship will not be accountable for luggage, goods, or other description of property, unless bills of lading have been signed therefor.

“Each first and second class adult passenger allowed to have 20 cubic feet of luggage free: but no merchandise, plate, jewellery, precious stones, specie, or bullion will be carried as luggage.

“Regulations of the steamer to be strictly complied with.”

“No. 16.

“Not transferrable,

“and to be exchanged at the Company's office in Galway.”

On the back of the ticket was the following endorsement:—

“This ticket entitles Mr. Wilton to a free passage from Galway to Liverpool on the arrival of the steamer *Argo* sailing from New York, June 23.

“This coupon must be cut off by the purser, signed by him, and returned to the passenger.”

The plaintiff took on board with him at New York a quantity of luggage packed in several trunks, the contents of which were not declared by him or asked for by the Company's servants. No bill of lading was given or demanded: nor was there any evidence that the luggage exceeded the stipulated measurement. The *Argo* started on her voyage from New York with the plaintiff and his luggage on board on the 23d of June, 1859, and five days afterwards struck upon a rock in Trespassy Bay, on the coast of Newfoundland, and, notwithstanding every exertion

by the officers and crew, little besides their lives and those of the [\*457  
 \*passengers was saved. The plaintiff's luggage was all lost. The defendants caused the plaintiff to be conveyed by another vessel from Newfoundland to Greenock, and paid his fare thence to Liverpool.

It was admitted that the loss of the vessel was occasioned by the negligence of the captain in proceeding at too great speed in a dense fog.

On the part of the defendants it was submitted that the terms upon which the plaintiff was received as a passenger precluded all liability in them for the loss of his luggage: and, under his Lordship's direction, a verdict was taken for the plaintiff (the damages to be referred), with leave to the defendants to move to enter a verdict for them, or a nonsuit, if the Court should be of opinion that they were not liable,—power being also reserved to the Court to make any amendment in the declaration they might think fit.

*Bovill*, Q. C., in Michaelmas Term last, accordingly obtained a rule nisi to enter a verdict for the defendants, or a nonsuit, "on the ground that the defendants were not liable under the terms of the passage-ticket, that the plaintiff's case was not established, and that the defence was established."

*Shee*, Serjt., and *Malcolm*, in Hilary Term, showed cause.—The main question is, whether the defendants can avail themselves of any defence founded upon the conditions contained in the passage-ticket. For this they relied principally on the third, fourth, and fifth pleas. The third plea merely puts in issue the second inducement in the declaration, that the defendants were common carriers of passengers and their luggage, for hire, between New York and Galway. That allegation is mere surplusage, and might very well be struck out of the declaration: and the plaintiff had \*leave to amend. [WILLES, J.—It might have been [\*458 material in *Benett v. The Peninsular and Oriental Steam-Boat Company*, 6 C. B. 775 (E. C. L. R. vol. 60), where the defendants refused to receive the passenger. But it cannot be material where the passenger has been received. He also referred to *De Rothschild v. The Royal Mail Steam-Packet Company*, 7 Exch. 734.†] The fourth plea relies upon the conditions contained in the passage-ticket as exempting the defendants from all liability, including an exemption from liability for a loss arising from the negligence of their servants. The first of these is,—“In case of the loss or detention of the ship during the voyage by any of the accidents of navigation, or by any dangers of the sea, no liability of any kind is to attach to the proprietors.” In *Abbott on Shipping*, 8th edit. 388 (9th edit. 319), it is said, that “Not every loss proceeding directly from natural causes is to be considered as happening by peril of the sea. It was decided by Lord Kenyon, in *Rohl v. Parr*, 1 Esp. N. P. C. 445, that the destruction of a vessel by worms at sea, was not a loss by peril of the sea. If a ship perish in consequence of striking against a rock or shallow, the circumstances under which the event takes place must be ascertained, in order to decide whether it happened by a peril of the sea or by the fault of the master. If the situation of the rock or shallow is generally known, and the ship not forced upon it by adverse winds or tempest, the loss is to be imputed to the fault of the master. On the other hand, if the ship is forced upon such a rock or shallow by adverse winds or tempest, or if the shallow

was occasioned by a sudden and recent collection of sand in a place where ships could before sail in safety, the loss is to be attributed to the act of God or the perils of the sea." Here, the loss was confessedly occasioned by the negligence of the master, who, proceeding at an improper \*459] speed in a dense fog, without knowing where he was, suddenly found himself upon a rock, in a place of peculiar danger at the period of the year, a long way out of his proper course. [WILLES, J.—In a recent case in this Court,—*Phillips v. Clark*, 2 C. B. N. S. 156 (E. C. L. R. vol. 89),—it was held that a stipulation in a bill of lading, that the shipowner is "not to be accountable for leakage or breakage," would not exempt him from responsibility for a loss by these means arising from *gross negligence*.] That is an authority precisely in point. Cockburn, C. J., there says: "Admitting that a carrier may protect himself from liability for loss or damage to goods intrusted to him to carry, even if occasioned by negligence on the part of himself or his servants, provided any one is willing to contract with him on such terms; yet it seems to me that we ought not to put such a construction upon the contract as is here contended for, when it is susceptible of another and a more reasonable one. It is not to be supposed that the plaintiff intended that the defendant should be exempted from the duty of taking ordinary care of the goods that were intrusted to him. When it is borne in mind what is the ordinary duty of a carrier, it is plain what the parties intended here. So long ago as in the case of *Dale v. Hall*, 1 Wils. 281, it is laid down (by Lee, C. J.) that 'everything is a negligence in a carrier or hoyman that the law does not excuse, and he is answerable for goods the instant that he receives them into his custody, and in all events, except they happen to be damaged by the act of God or the King's enemies: and a promise to carry safely is a promise to keep safely.' Amongst the events which the carrier here would under ordinary circumstances be responsible for, are, leakage and breakage. He stipulates to be exempted from the liability which the law would \*460] otherwise cast upon him in these respects. \*But there is no reason why, because he is by the terms of the contract relieved from that liability, we should hold that the plaintiff intended also to exempt him from any of the consequences arising from his negligence." The fifth plea alleges that the plaintiff was received on board the ship as a passenger to be conveyed from New York to Galway, with his luggage, upon the terms that the defendants "should not be accountable for luggage, goods, or other description of property, unless bills of lading should have been signed for the same; and that each adult passenger should be allowed to have 20 cubic feet of luggage free, but no merchandise, plate, jewellery, precious stones, specie, or bullion should be carried as luggage;" that the luggage in question was received by the defendants upon the terms aforesaid; that no bills of lading were signed for the said luggage; and that the same was *accidentally lost* during the voyage, by reason of the ship being wrecked and lost by the dangers of the sea and accidents of navigation. The allegation that the luggage was "accidentally lost" is a material part of the plea. Reading these two clauses of the passage-ticket together, the fair meaning of this part of the conditions is, that the passenger is entitled to have 20 cubic feet of luggage carried free, and that, for any appreciable excess beyond that quantity, he must take a bill of lading and pay freight,—not a bill

of lading such as is commonly understood amongst mercantile men, but a note to intimate what are the articles in respect of which the freight is to be paid. Nobody ever suggested that there should be a bill of lading here; nor was there any proof that the plaintiff's luggage exceeded the quantity limited. If the construction of these conditions which is contended for by the defendants be the true one, the result would be that every article brought on board by a passenger must be \*in- [\*461serted in a bill of lading, and remain under the care of the master during the whole voyage; and thus the passenger would be precluded from the use of many things which are essential comforts on such a passage. A construction so inconvenient will hardly be adopted, when the contract is susceptible of another which is more consonant with common sense and reason, and in entire accordance with the Company's own conduct. Assuming, however, that the condition does embrace luggage within the prescribed limit, it is submitted that it affords no defence to this action. Such a stipulation will not protect a carrier or any other person against the consequences of his own negligence. It might afford protection against inadvertence, or an incorrect or short delivery, no default or misconduct being proved. But, if it is clearly shown that the loss has occurred through the negligence of the defendant, no such stipulation can enure to limit his liability. It was expressly held in *Wyld v. Pickford*, 8 M. & W. 443,† that, though a carrier might limit his liability by a special contract, he is still bound to take ordinary care in the carriage of the goods, and is liable, not only for any act which amounts to a total abandonment of his character of a carrier, or for wilful negligence, but also for a conversion by a misdelivery arising from inadvertence or mistake, if such inadvertence or mistake might have been avoided by the exercise of ordinary care. Parke, B., in delivering the judgment of the Court, there says: "Upon reviewing the cases upon this subject, the decisions and dicta will not be found altogether uniform, and some uncertainty still remains as to the true ground on which cases are taken out of the operation of these notices. In *Bodenham v. Bennett*, 4 Price 34, Wood, B., considers that these notices were introduced for the purpose of protecting carriers from extraordinary events, and not meant to exempt them \*from due [\*462and ordinary care. On the other hand, in some cases it has been said that the carrier is not by his notice protected from the consequences of *misfeasance* (Lord Ellenborough, in *Beck v. Evans*, 16 East 247); and that the true construction of the words 'lost or damaged' in such a notice, is, that the carrier is protected from the consequences of negligence or misconduct *in the carriage* of goods, but not if he divests himself wholly of the charge committed to his care, and of the character of carrier: Bayley, J., and Holroyd, J., in *Garnett v. Willan*, 5 B. & Ald. 57, 60 (E. C. L. R. vol. 8). In many other cases, it is said he is still responsible for 'gross negligence:' but in some of them that term has been defined in such a way as to mean ordinary negligence (Story on Bailments, § 11), that is, the want of such care as a prudent man would take of his own property: Best, J., in *Batson v. Donovan*, 4 B. & Ald. 30 (E. C. L. R. vol. 7), and Dallas, C. J., in *Duff v. Dodd*, 3 Brod. & B. 182 (E. C. L. R. vol. 7). The weight of authority seems to be in favour of the doctrine, that, in order to render a carrier liable after such a notice, it is not necessary to prove a total abandonment of that

character, or an act of wilful misconduct, but that it is enough to prove an act of ordinary negligence,—*gross* negligence in the sense in which it has been understood in the last-mentioned cases; and that the effect of a notice in the form stated in the plea, is, that the carrier will not, unless he is paid a premium, be responsible for all events (other than the act of God and the Queen's enemies) by which loss or damage to the owner may arise, against which events, he is by common law a sort of insurer; but still he undertakes to *carry* from one place to another, and for some reward in respect of the carriage, and is therefore bound to use ordinary care in the custody of the goods, and their conveyance to \*463] and delivery at their place of destination, and in providing \*proper vehicles for their carriage; and, after such a notice, it may be that the burthen of proof of damage or loss by the want of such care would lie on the plaintiff." [WILLIAMS, J.—Your argument goes the length of saying that by no means could the defendants protect themselves against the consequences of negligence.] Just so. In *Simons v. The Great Western Railway Company*, 2 C. B. N. S. 620 (E. C. L. R. vol. 89), a declaration against a railway Company for damage to goods intrusted to them to carry, alleged that the goods were delivered to the defendants as common carriers, and that they received them as such common carriers. To this the defendants pleaded that the goods were received by the defendants to be carried subject to a special contract whereby they were declared not to be answerable for any loss or damage, however caused. In support of the pleas, the defendants produced a paper, *signed by the plaintiff*, acknowledging that the goods were to be carried subject to certain conditions, one of which was, that the Company were not to be responsible for any loss or damage, however caused, &c. On the part of the plaintiff it was proved, that, when asked by a clerk of the defendants at the time the goods were delivered at the Company's warehouse to sign the paper, the plaintiff expressed his unwillingness to do so, inasmuch as he could not see to read it, whereupon the clerk said that it was of no consequence, and that the signature was a mere matter of form; and that the plaintiff, relying upon that assurance, signed the paper. It was held, that, upon this evidence, the jury were warranted in finding that the goods were not delivered to the Company to be carried under the special contract. The declaration here complains also of the personal inconvenience and delay sustained by the plaintiff; and to this the eighth plea is addressed. [*Bovill*.—There is \*464] no breach \*except in respect of the negligent loss of the goods.] That may be remedied by an amendment.

*Bovill*, Q. C., *Lush*, Q. C., and *Honyman*, in support of the rule.—By the general law, parties, being free agents, may contract in any form they please: and it has repeatedly been held that railway companies may by special contracts relieve themselves from the consequence of their own negligence: *Shaw v. The York and North Midland Railway Company*, 13 Q. B. 347 (E. C. L. R. vol. 66); *Austin v. The Manchester, Sheffield, and Lincolnshire Railway Company*, 20 Law J., Q. B. 440; *Carr v. The Lancashire and Yorkshire Railway Company*, 7 Exch. 707;† *Peek v. The North Staffordshire Railway Company*, 1 Ellis, B. & E. 958, in error, 986 (E. C. L. R. vol. 96); *Harrison v. The London, Brighton, and South Coast Railway Company*, 29 Law J., Q. B. 209. [ERLE, C. J.—Those decisions brought down upon the Companies the

Railway Traffic Act, 17 & 18 Vict. c. 30, which makes them almost universally responsible.] That requires the conditions to be reasonable: *Simons v. The Great Western Railway Company*, 18 C. B. 805 (E. C. L. R. vol. 83). Mr. Cardwell's Act, however, does not apply to marine Companies. These Companies have found by experience that they cannot afford to carry passengers at the low rates they do, unless they limit their liability in respect of luggage by these special contracts. Unless bills of lading are taken, the Company's servants cannot know what the goods are or where to stow them. If the passenger wishes to obtain the security of the Company for his luggage, he must adopt the course pointed out to him. It is not a question of reasonableness; but of contract or no contract. By the terms of the passage ticket here, which is the contract between the plaintiff and the Company, it is expressly stipulated that, "in case of loss or detention of the ship during \*the voyage by any of the accidents of navigation, or by any of the [\*465 dangers of the sea, no liability of any kind is to attach to the proprietors." The loss here arose from one of the accidents of navigation. If the plaintiff's luggage had been insured, he could have recovered compensation for his loss from the underwriters. The remote cause of the loss, no doubt, was, the negligence of the captain: but that makes no difference. In *jura non remota causa sed proxima spectatur*: see *Broom's Legal Maxims*, 3d edit. 202, where all the authorities as to the application of this maxim to policies of insurance are collected. [WILLES, J.—*Sadler v. Dixon*, 8 M. & W. 895,† settled that.] The latest authority on the subject is, *Thompson v. Hopper*, 1 Ellis, B. & E. 1038 (E. C. L. R. vol. 96). As to the case of *Phillips v. Clark*, 2 C. B. N. S. 256 (E. C. L. R. vol. 89), it is to be observed that but little assistance can be derived in construing a contract, from a decision upon the language of a totally different contract. Here, the plaintiffs, who do not, like common carriers, profess to carry goods for anybody, tell their passengers distinctly that they will not be responsible for luggage unless bills of lading have been signed therefor. The plaintiff accepts a passage upon those terms. If these conditions are complied with, and a bill of lading taken, the nature and amount of the liability assumed by the Company are ascertained and defined. The liability of a carrier of passengers is different from that of an ordinary carrier of goods: *Middleton v. Fowler*, 1 Salk. 282; *Upshare v. Aidee*, Com. R. 25; *Ross v. Hill*, 2 C. B. 877 (E. C. L. R. vol. 52). In *Story on Bailments*, § 601, treating of the liabilities of passenger carriers, the learned author says, —"These naturally flow from their duties. As they are not, like common carriers of goods, insurers against all injuries except by the act of God or by public enemies, the inquiry is naturally presented, [\*466 \*what is the nature and extent of their responsibility? It is certain that their undertaking is not an undertaking absolutely to convey safely. But, although they do not warrant the safety of the passengers at all events, yet their undertaking and liability go to this extent, that they and their agents possess competent skill, and that they will use all due care and diligence in the performance of their duty. But, in what manner are we to measure this due care and diligence? Is it ordinary care and diligence, which will make them liable only for ordinary neglect? Or is it extraordinary care and diligence, which will render them liable for slight neglect? As they undertake for the car-

riage of human beings, whose lives and limbs are of great importance as well to the public as to themselves, the ordinary principle in criminal cases, where persons are made liable for personal wrongs and injuries arising from slight neglect, would seem to furnish the true analogy and rule. It has been accordingly held that the passenger carriers bind themselves to carry safely those whom they take into their coaches, so far as human care and foresight will go, that is, for the utmost care and diligence of any cautious persons; and, of course, they are responsible for any, even the slightest neglect." For this numerous authorities are referred to; and, amongst others, a case of *Stokes v. Saltonstall*, 13 Peters, R. 181, where it is said in the note "this whole subject was thoroughly examined by the Supreme Court of the United States; and the opinion of the Court, delivered by Mr. Justice Barbour, will be found to embrace and to exhaust the learning applicable to it." The same considerations apply to the passenger's luggage. The object of this special contract was, to protect the Company against a liability they would otherwise have incurred,—against the consequences of the dangers and \*accidents of navigation brought about by means for \*467] which but for the special contract the Company would have been responsible. It is obviously, therefore, no answer to say that the loss was occasioned by the captain's negligence. [WILLIAMS, J.—Upon what principle was it that the protection afforded to carriers, before the Carriers Act, 11 G. 4 & 1 W. 4, c. 68, where the notice limiting their liability was brought home to the knowledge of the customer, was destroyed by proof of gross negligence?] Because at common law they were insurers. *Cur. adv. vult.*

ERLE, C. J., now delivered the judgment of the Court: (a)—

Upon this rule for entering the verdict for the defendants, two questions have been argued: the first related to the construction to be put on the following condition in the passenger's ticket:—"In case of the loss or detention of the ship during the voyage by any of the accidents of navigation, or by any dangers of the sea, no liability of any kind is to attach to the proprietors." On this question the Court gives no opinion. The second related to the construction of another condition in the same ticket, viz., "The ship will not be accountable for luggage, goods, or other description of property, unless bills of lading have been signed therefor. Each first and second class adult passenger allowed to have 20 cubic feet of luggage free: but no merchandise, plate, jewellery, precious stones, specie, or bullion will be carried as luggage."

This condition consists of three parts. The first is, "The ship will \*468] not be accountable for luggage, goods, \*or other description of property, unless bills of lading have been signed therefor." The meaning of these words is plain: the purpose also is plain,—to have some security against the fabrication of exaggerated claims. If this part is taken by itself, it is decisive against the plaintiff. He claims to make the ship accountable for luggage, though he has taken no bill of lading.

But the contention of the plaintiff was, to read the first part above set out with the second, viz., "Each first and second class passenger allowed to have 20 cubic feet of luggage free;" and to construe the second part as an exception out of the first: so that it should mean that

(a) The Judges present at the argument were, Erle, C. J., Williams, J., and Keating, J.

the ship will not be accountable, unless a bill of lading is taken, for any luggage beyond 20 cubic feet, which the passenger may carry free of any charge, and also free from the condition requiring a bill of lading.

We, however, are of opinion that this is not the true construction of the words. The stipulation for a bill of lading as a condition for being accountable is absolute: the stipulation for 20 cubic feet of luggage free is unconnected therewith, being an exemption from charge so far and no farther, leaving the passenger to get a bill of lading for all for which he intends to make the ship accountable, and at the same time giving him the option of taking luggage under his personal control without a bill of lading, but, in that case, carried at his own risk. In many such cases, the value may be small, and the convenience of personal control without any restriction may be great.

The remaining part of the condition does not affect the construction which governs this case. It takes merchandise, plate, jewellery, precious stones, specie, \*and bullion out of the category of luggage.<sup>(a)</sup> The meaning probably is, to require payment for such [\*469 articles upon a different scale from luggage: but nothing turns on those words here.

The plaintiff further contended, that, as no bill of lading was offered, the defendants could not take advantage of their condition. But in this we also think that he fails. If he had offered to take a bill of lading, and had not been able to obtain it,—as was the case in *The Great Western Railway Company, app., Goodman, resp.*, 12 C. B. 313 (E. C. L. R. vol. 74), there would have been ground for the argument: but there was no evidence that he had done so. We have, therefore, come to the conclusion that the defendants are entitled to our judgment on the second question, and that this rule should be made absolute.

We decline to make any amendment enabling the plaintiff to recover in respect of a default in not carrying him personally, because we think the action was not brought for the purpose of trying any question relating thereto.

Rule absolute.

(a) See *Cahill v. The London and North Western Railway Company*, ante, p. 154, now (H. T. 1862) under consideration in the Court of error.

### \*PICKARD v. SMITH. May 29.

[\*470

Refreshment-rooms and a coal-cellar at a railway station were let by the Company to one S., the opening for putting coals into the cellar being on the arrival platform. A train coming in whilst the servants of a coal merchant were shooting coals into the cellar for S., the plaintiff, a passenger, whilst passing (as the jury found) in the usual way out of the station, without any fault of his own, fell into the cellar opening, which the coal merchant's servants had negligently left insufficiently guarded:—Held, that S., the occupier of the refreshment-rooms and cellar, was responsible for this negligence.

And *semble*,—per Williams, J.,—that the railway Company also would be liable, but not the coal merchant.

THIS was an action brought by the plaintiff to recover damages for an injury sustained by him by falling into a hole in the platform of the Manchester station of the Liverpool and Manchester Railway.

The cause was tried before Blackburn, J., at the last Winter assizes at Liverpool. It appeared that, on the 19th of April last, the plaintiff

was a passenger by the Liverpool train which arrived at Manchester at about 8.40 p. m., and was proceeding along the platform on the usual way out, having a cloak across his shoulders and a bag in his hand, when he suddenly fell into a hole in the floor, bruising and hurting himself considerably.

The hole into which the plaintiff so fell was an opening or trap-door in the platform, forming the entrance to the coal-cellar of the refreshment-rooms attached to the station, which trap-door was always kept closed except when coals were being put into the cellar. The defendant was the occupier of the refreshment-rooms and cellar as tenant of the Company; and at the time the accident happened coals were being lowered into the cellar for his use, and by his order, by the servants of the coal merchant from whom he had ordered them.

The plaintiff swore that at the time he fell into the hole there was nothing to indicate danger, and no protection, nor any person guarding the hole. On the other hand, the servants of the coal merchant who were employed on the occasion swore that proper protection was placed over the hole and repeated warnings given as the passengers from the \*471] train thronged \*by, and that there was plenty of light to enable the plaintiff to see where he was going.

On the part of the defendant it was submitted that the action was improperly brought against the present defendant; and that, if maintainable at all, it could only be against the Company, or against the coal merchant by whose servants the trap-door was opened.

The learned Judge intimated an opinion that the occupier of the cellar and hole was liable if the hole was not properly guarded when being used for him in putting in his coals: and he left it to the jury to say whether the hole was so protected as it reasonably ought to have been in such a place, or whether there was negligence; and whether or not the plaintiff could by reasonable care have avoided the accident.

The jury returned a verdict for the plaintiff, damages 100*l.*; and the learned Judge reserved leave to move to enter a nonsuit, if the Court should be of opinion that the defendant as occupier of the cellar was not liable.

*Edward James*, Q. C., in Hilary Term last, obtained a rule nisi accordingly.—He submitted that there was no pretence for saying that the defendant personally had been guilty of any negligence, and he was not responsible for the acts of the servants of the coal-merchant. The cases of *Reedie v. The London and North Western Railroad Company*, 4 Exch. 244,† *Knight v. Fox*, 5 Exch. 721,† *Overton v. Freeman*, 11 C. B. 367 (E. C. L. R. vol. 73), and *Ellis v. The Sheffield Gas Consumers' Company*, 2 Ellis & B. 767 (E. C. L. R. vol. 75), were referred to.

*Overend*, Q. C., and *Kemplay*, showed cause.—The defendant was the occupier of the refreshment-rooms and cellar: he alone had complete control over the coal-shoot, and over the persons he employed to \*472] put \*the coals there. [WILLIAMS, J.—The fact of the trap-door being on the platform of the railway makes no difference. Suppose the hole were in the foot-pavement of a public way; would not the housekeeper who employs the coal merchant to open it, and who trusts him to guard and to close it, be responsible?] No doubt he would. The case of *Hale v. The Sittingbourne and Sheerness Railway Company*, 6 Hurlst. & N. 488,† is precisely in point. There, the defendants, a

railway Company, were authorized by their Act of Parliament to construct a railway bridge across a navigable river: the Act provided that it should not be lawful to detain any vessel navigating the river for a longer time than sufficient to enable any carriages, animals, or passengers ready to traverse, to cross the bridge, and for opening it to admit such vessel: the defendants employed a contractor to construct the bridge in conformity with the provisions of the Act of Parliament, but, before the works were completed, the bridge, from some defect in its construction, could not be opened, and the plaintiff's vessel was prevented from navigating the river: and it was held that the defendants were liable for the damage thereby caused to the plaintiff. Pollock, C. B., there says: "The short ground on which my judgment proceeds, is, that this does not fall within that class of cases where the principal is exempt from responsibility because he is not the master of the person whose negligence or improper conduct has caused the mischief. This is a case in which the maxim *Qui facit per alium facit per se* applies. Where a person is authorized by Act of Parliament or bound by contract to do particular work, he cannot avoid responsibility by contracting with another person to do that work. In *Ellis v. The Sheffield Gas Consumers' Company*, 2 Ellis & B. 767 (E. C. L. R. vol. 75), Lord Campbell said it is a proposition absolutely \*untenable that in [\*473 no case can a man be responsible for the act of a person with whom he has made a contract. I am clearly of opinion, that, if the contractor does the thing which he is employed to do, the employer is responsible for that thing as if he did it himself.' Here, the contractor was employed to make a bridge, and he did make a bridge which obstructed the navigation. The case, then, falls within the principle laid down in *Ellis v. The Sheffield Gas Consumers' Company*. Where the act complained of is purely collateral, and arises incidentally in the course of the performance of the work, the employer is not liable, because he never authorized that act,—the remedy is against the person who did it." Martin, B., says: "I do not say that the contractor is not liable; he may be liable as one of the persons who caused the obstruction; or the Company may have a right of action against him on the contract. But that is no answer to the plaintiff. The persons liable to him are those who by themselves or their contractors created the obstruction." And Wilde, B., added: "The distinction appears to me to be, that, when work is being done under a contract, if an accident happens and an injury is caused by negligence in a matter entirely collateral to the contract, the liability turns on the question whether the relation of master and servant exists. But, when the thing contracted to be done causes the mischief, and the injury can only be said to arise from the authority of the employer because the thing contracted to be done is imperfectly performed, there the employer must be taken to have authorized the act, and is responsible for it." [WILLIAMS, J.—I believe we are all of opinion that that case is conclusive.]

*Edward James*, Q. C., and *Spinks*, in support of the rule.—It is not denied that a person who creates or \*causes a nuisance is liable [\*474 for the consequences; nor will it be contended, that, if a work is productive of injury to a third person, those to whom the authority is given by an Act of Parliament to do the work may not be responsible though they have intrusted its performance to a sub-contractor. The

distinction taken by the Lord Chief Baron in *Hole v. The Sittingbourne and Sheerness Railway Company*, that, where the act which causes the injury is entirely collateral, the person whose negligent conduct occasions the damage alone is responsible for it, is precisely applicable here. The action is founded on a breach of duty. What duty did the defendant owe to the plaintiff under the circumstances of this case? The coal-hole necessarily must be open for some purpose and for some portion of time: and it is not suggested that it was kept open for an unreasonable time. The alleged negligence, therefore, is clearly collateral to the employment of the persons who caused the mischief. [WILLIAMS, J.—The doctrine you are contending for would put an end to all liability of a person who employs a sub-contractor.] The ordinary rule is, that, where a man does not personally interfere, he is not responsible for an injury, unless it be caused by persons under his control. In *Hole v. The Sittingbourne and Sheerness Railway Company*, the Company were authorized to construct the bridge. If they had personally done the work, they would clearly have been liable for its faulty construction. That case is utterly at variance with all the prior authorities, if it was intended to go further than the Lord Chief Baron puts it. In *Reedie v. The London and North Western Railway Company*, 4 Exch. 244,† a Company empowered by Act of Parliament to construct a railway, contracted under seal with certain persons to make a portion of the line, and by the contract reserved to themselves the power of dismissing any \*475] of the contractors' workmen for incompetence. The \*workmen, in constructing a bridge over a public highway, negligently caused the death of a person passing beneath along the highway, by allowing a stone to fall upon him. In an action by the administratrix of the deceased against the Company, it was held that they were not liable; and that, in such case, the terms of the contract in question did not make any difference. In *Ellis v. The Sheffield Gas Consumers' Company*, the true distinction is taken. It was there held, that, though a person employing a contractor to do a lawful act is not responsible for the negligence or misconduct of the contractor or his servants in executing that act, yet if the act itself is wrongful, the employer is responsible for the wrong so done by the contractor or his servants, and is liable to third persons who sustain damage from the doing of that wrong. "I perfectly approve," says Lord Campbell, "of the cases which have been cited.(a) In those cases the contractors were employed to do a thing perfectly lawful: the relation of master and servant did not subsist between the employer and those actually doing the work; and therefore the employer was not liable for their negligence. He was not answerable for anything beyond what he employed the contractor to do; and, that being lawful, he was not liable at all. But, in the present case, the defendants had no right to break up the streets at all: they employed Watson, Brothers, to break up the streets, and in so doing to heap up earth and stones so as to be a public nuisance: and it was in consequence of this being done by their orders that the plaintiff damage sustained. It would be monstrous if the party causing another to do a thing were exempted from liability for that act, merely because there was a contract between him and the person immediately causing the

(a) *Overton v. Freeman*, 11 C. B. 867 (E. C. L. R. 73), and *Knight v. Fox*, 5 Exch. 721.†

\*act to be done." Can it be said here that the defendant was a party causing an unlawful act to be done? The employing a coal merchant to put coals into the cellar was a perfectly lawful act. The injury arose from something quite collateral, viz., a careless omission on the part of the coal merchants' servants to guard the hole properly. [KEATING, J.—Suppose the coal-dealer's men had gone away and left the hole unclosed, who would have been responsible for the consequences?] Their employer, undoubtedly: but in the absence of any notice to the defendant of that negligence on their part, no liability would have been incurred by the defendant. [KEATING, J.—Do you contend, then, that there was no duty cast upon the occupier of the refreshment rooms and cellar?] None. He was not bound to fence. The hole was made by the railway Company, and they alone used and had control over the platform. In no sense can it be said that the act which caused the mischief was an act authorized by the defendant. [WILLIAMS, J.—What do you say to the case of *Randelson v. Murray*, 3 N. & P. 239? There, the defendants, who were the occupiers of a bonded warehouse, engaged a master porter to lower and convey a barrel of flour from their warehouse; the master porter engaged a master carter, and both of them attended with their men: during the process of lowering it from the warehouse, the barrel fell and injured the plaintiff, owing to the defectiveness of a rope furnished by the master porter: and the defendants were held to be liable. Lord Denman says: "I think the defendants are properly sued: it makes no difference whether they employed people of their own to move their goods, or procured others who were likely to move them more expertly, and left it to their superintendence."] That has never been considered a very satisfactory decision, and is supposed to have been effectually disposed of by *Reedie v. The London and North Western Railway Company*. In *Hounsell v. Smyth*, 7 C. B. N. S. 731 (E. C. L. R. vol. 97), it was held that an owner of land is under no legal obligation to fence an excavation therein, unless it is made so near a public road as to constitute a public nuisance. It may be that the railway Company owe a duty to the public using their railway, to keep the approaches to it safe and free from obstruction: against them, as well as against the coal merchant, it may be that the plaintiff has a good remedy. [WILLIAMS, J.—Against the railway Company, perhaps; but clearly not against the coal merchant. KEATING, J.—If the plaintiff when he met with the accident was going to the refreshment-rooms, you probably would not dispute the defendant's liability?] No: there would in that case be a sort of relation between them. [WILLIAMS, J.—Suppose the railway Company let the refreshment-rooms to a tenant, with a dangerously projecting scraper on each side of the doorway, and a passenger fell over one of them and was injured,—who would be responsible?] The occupier of the refreshment-rooms, if the party were going to them; the railway Company, if he were a mere passenger.

*Cur. adv. vult.*

WILLIAMS, J., now delivered the judgment of the Court:—

This was an action to recover compensation in damages for an injury sustained by the plaintiff by falling down a hole in the arrival platform of the Manchester station of the Liverpool and Manchester Railway.

The plaintiff, when he fell into the hole, was lawfully on the platform,

leaving the station in the usual way after having arrived at Manchester as a passenger by the railway. He was not guilty of any negligence \*478] \*contributory to the injury. He could not by reasonable care have avoided it. The hole into which he so fell was an opening in the platform, forming the entrance into a coal-cellar belonging to the refreshment-rooms attached to the station, and it was at all times secured by a trap-door, except when that was opened for the purpose of putting coals into the cellar. The way out of the station lay over that trap-door.

The defendant was the lessee, under the railway Company, and the occupier of the refreshment-rooms and cellar; and on the day in question a coal merchant by his orders was putting a supply of coals into the cellar, and for that purpose had opened the trap-door, and negligently left it open and unguarded at the time when the plaintiff fell in; whereby the injury complained of was occasioned.

At the trial before Blackburn, J., it was insisted that the action was improperly brought. The learned Judge, however, left the case to the jury, asking them to consider whether the hole was so protected as it reasonably ought to be in such a place, or if there was negligence (saying that, in his opinion, the defendant, as occupier of the cellar and hole, was liable if the hole was not properly kept when being used for him in putting in his coals), and whether the plaintiff could by reasonable care have avoided the accident.

Upon both these questions the jury found for the plaintiff: but the learned Judge reserved leave to enter a nonsuit, if the defendant as occupier of the cellar was not liable.

A rule was obtained accordingly, which was argued upon the 12th of February last, before my Brothers Willes and Keating and myself, when time was taken to consider.

For the decision of the case, two questions must be considered,—first, \*479] whether the defendant would have \*been liable in case he had with his own hands opened the trap, and afterwards negligently left it open and unguarded, whereby a person lawfully using the platform was injured: if so, then, secondly, whether he is under the circumstances of this case absolved by reason of the leaving of the trap open and unguarded being the immediate default of the coal-merchant, who was in one sense an independent agent, as not being in the relation of servant to the defendant.

With respect to the first question, it must be answered in the affirmative, because the defendant became the occupier of the cellar and hole subject to the use of the platform overhead by passengers, and he knew that it would be so used, and he knew that the hole with the door open would be in effect a trap to catch such passengers. It was his obvious duty, therefore, if he used the hole in a way necessarily to create such danger, to take reasonable precautions not to injure persons lawfully using the platform: *Sic utere tuo ut alienum non lædas*. No sound distinction in this respect can be drawn between the case of a public highway and a road which may be and to the knowledge of the wrongdoer probably will in fact be used by persons lawfully entitled so to do. The opening of the trap was an act equally likely to be injurious to such passengers as throwing a stumbling-block in their way would have been. If an authority be wanted for the proposition, it will be found in a case

in this Court, of *Corby v. Hill*, 4 C. B. N. S. 556 (E. C. L. R. vol. 93). Probably the declaration in that case may have been ill, for not alleging knowledge that the avenue was likely to be used, unless that was implied in the averment of negligence: but, upon the facts, the defendant there was held liable in tort for negligently placing and leaving an obstruction in a private avenue, known to be used in the ordinary way, whereby a person \*lawfully using it, though having no permanent right of way, was injured. [\*480]

As to the second question, the defendant is not absolved by the fact of the coal merchant being employed, and of the injury being the consequence of his immediate act. Unquestionably, no one can be made liable for an act or breach of duty, unless it be traceable to himself or his servant or servants in the course of his or their employment. Consequently, if an independent contractor is employed to do a lawful act, and in the course of the work he or his servants commit some casual act of wrong or negligence, the employer is not answerable. To this effect are many authorities which were referred to in the argument. That rule is, however, inapplicable to cases in which the act which occasions the injury is one which the contractor was employed to do; nor, by a parity of reasoning, to cases in which the contractor is intrusted with the performance of a duty incumbent upon his employer, and neglects its fulfilment, whereby an injury is occasioned. Now, in the present case, the defendant employed the coal merchant to open the trap in order to put in the coals; and he trusted him to guard it whilst open, and to close it when the coals were all put in. The act of opening it was the act of the employer, though done through the agency of the coal merchant; and the defendant, having thereby caused danger, was bound to take reasonable means to prevent mischief. The performance of this duty he omitted; and the fact of his having intrusted it to a person who also neglected it, furnishes no excuse, either in good sense or law.

The ruling of Blackburn, J., was therefore correct, and the rule for a nonsuit ought to be discharged. Rule discharged.

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**\*THE BOG LEAD MINING COMPANY v. MONTAGUE.** [\*481]  
June 11.

By the Joint Stock Companies Act, 1856 (19 & 20 Vict. c. 47), sched. Table B. (1), it is provided that "no person shall be deemed to have accepted any share in the Company unless he has testified his acceptance thereof by writing under his hand in *such form as the Company from time to time directs*:" and s. 19 enacts that "every person who has accepted any share in a Company registered under this Act, and whose name is entered in the register of shareholders, and no other person (except a subscriber to the memorandum of association in respect of the shares subscribed for by him), shall for the purposes of this Act be deemed to be a shareholder."

A joint stock company, duly registered pursuant to the above statute (and the 20 & 21 Vict. c. 14), issued a prospectus, at the foot of which was printed a form of application for shares. The defendant paid the required deposit to the bankers of the Company, and filled up, signed and sent to the directors an application for shares, as follows:—"Gentlemen,—Having paid to the Bank of London to your credit 5*l.*, being a deposit of 5*s.* per share on twenty shares in the above Company, I request you to allot me that number of shares, and I hereby agree to accept the same, and undertake to pay the amount of calls that may be made thereon, in accordance with the Company's Act of incorporation."

The Company thereupon allotted to the defendant the number of shares he applied for, and his

name was entered on the register of shareholders, and he paid two calls upon the shares so allotted to him. The defendant never testified his acceptance of the shares, in writing under his hand, otherwise than by signing the letter of application: and the Company never "directed" any other form:—

Held,—by analogy to the case of a contract for a specific ascertained chattel,—that the defendant's letter of application, agreeing to accept a specific number of shares afterwards allotted to him, was a sufficient acceptance of the shares to satisfy the statute.

THIS was an action by a joint stock Company, for calls.

The declaration stated that the plaintiffs were a Company registered under the Joint Stock Companies Acts of 1856 (19 & 20 Vict. c. 47) and 1857 (20 & 21 Vict. c. 14), by the registration of a memorandum of association with articles of association annexed, and with a nominal capital of 40,000*l.* divided into 8000 shares of 5*l.* each, and that by the said articles it was provided that the directors might from time to time make such calls upon the shareholders in respect of all moneys unpaid on their shares as they should think fit, provided that twenty-one days' notice at least was given of such call, and that each shareholder should be liable to pay the amount of calls so made, to the person and at the times and places appointed by the Company; and that if, before or on the day appointed for payment, any shareholder did not pay the amount of any call to which he was liable, then such shareholder should be liable to pay interest for the same at the rate of 5*l.* per cent. \*482] per annum from \*the day appointed for payment thereof to the time of actual payment: Averment, that the defendant became and then was a holder of twenty shares in the Company: that three several calls were made, two of 20*s.* and one of 15*s.* per share, upon the shareholders of the said Company, such amount of calls not exceeding the amount left unpaid on each share; and that the defendant became and was indebted to the said Company in the sum of 55*l.* for the said calls made on him by the said Company on the said twenty shares held by the defendant: General averment of performance by the plaintiffs of all conditions precedent: Breach, non-payment of the said calls.

There was also a count for interest, and a count upon an account stated.

The defendant pleaded, amongst other pleas, that he was not the holder of the said shares as alleged, nor did he ever accept any shares in the said Company, as by the statute and the said articles was required. Issue thereon.

The cause was tried before Wightman, J., at the last Spring Assizes for Surrey. The only evidence to show that the defendant was a proprietor of shares in the Company, was, that he sent in a letter of application for shares in the following form,—which was given at the foot of the prospectus issued by the Company:—

"To the directors of the Bog Lead Mining Company (Limited).

"Shares 5*l.* each.

"Gentlemen,—Having paid to the Bank of London to your credit 5*l.*, being a deposit of 5*s.* per share on twenty shares in the above Company, I request you to allot me that number of shares; and I hereby agree to accept the same, and undertake to pay the amount of calls that may be made thereon, in accordance with the Company's Act of incorporation.

"W. E. MONTAGUE."

\*The defendant paid the 5*l.* to the Company's bankers; and, in compliance with the request contained in the above letter, the directors allotted to him the number of shares for which he applied; and the defendant paid two calls thereon made prior to the calls in question. [\*483]

The defendant never testified his acceptance of the shares, in writing under his hand, otherwise than by signing the above letter of application; nor had the Company ever *directed* any form of acceptance, pursuant to the 19th section and Table B. in the schedule to the Joint Stock Companies Act, 1856, 19 & 20 Vict. c. 47. His name, however, was put upon the register of shareholders.

It was objected, on behalf of the defendant, that there was no sufficient acceptance of the shares by him, to constitute him a shareholder in the Company: and the case of *The New Brunswick and Canada Land and Railway Company (Limited) v. Muggeridge*, 4 Hurlst. & N. 160, 580,† was relied on. By the Joint Stock Companies Act, 1856, 19 & 20 Vict. c. 47, sched. Table B. (1), it is provided that "no person shall be deemed to have accepted any share in the Company, unless he has testified his acceptance thereof by writing under his hand in such form as the Company from time to time directs." In July, 1856, a prospectus of a Company was issued, at the foot of which was a form of application for shares. By the prospectus it was stated that all applications must be accompanied by a remittance of 2*l.* per share deposit on the number of shares applied for, and should any less number be allotted, the amount paid in excess would be returned. The defendant paid to the bankers of the proposed Company 600*l.*, and filled up and sent to the directors the printed form at the foot of the prospectus, as follows:—"Gentlemen,—Having paid into the hands of \*the Bank of London (the bankers of the proposed Company) the sum of 600*l.*, I request you will allot me 300 shares in the said undertaking: and I hereby agree to accept such shares, or any less number that may be allotted to me, and to pay the future calls thereon." The directors allotted to the defendant 250 shares, and returned him 100*l.*, the balance of his deposit. In August, 1856, a printed copy of the memorandum and articles of association, at the foot of which was a form of memorandum to be signed by a person accepting shares and consenting to be registered as a shareholder, was sent to the defendant. The Company was registered, and a certificate of incorporation was given under the Joint Stock Companies Acts, 1856 and 1857, on the 25th of September, 1856. In April, 1857, the secretary of the Company wrote to the defendant that the warrant for interest on the shares was ready, and offering to forward it on receiving the articles of association signed. The defendant, by letter signed by him, applied for the interest warrant and his share certificates. The secretary wrote in answer, enclosing a printed copy of the articles of association for the defendant's signature, stating, that on receipt of it, he would forward the share certificates and interest warrant. The defendant *never signed the memorandum of consent to be a shareholder*, but his name was placed on the register of shareholders in respect of the shares allotted to him. In an action for calls, it was held by the Exchequer Chamber,—affirming the judgment of the Court of Exchequer,—that, assuming it to be found as a fact that the Company had directed the acceptance of shares to be [\*484]

in the form appended to the articles of association, the defendant was not a shareholder in the Company.

Upon the authority of this case, the learned Judge directed a nonsuit to be entered.

\*485] *\*Shee*, Serjt., in Easter Term last, moved for a new trial, on the ground that the ruling of the learned Judge was erroneous. He submitted that there was a manifest distinction between the case of *The New Brunswick and Canada Land and Railway Company v. Muggeridge* and the present case, inasmuch as there a particular form of acceptance of shares had been directed by the Company, which the defendant had refused to sign; whereas here, there was no evidence that any form of acceptance had been provided. [BYLES, J.—There was no payment of any call there: the plaintiffs had to rest on the acceptance only.] The Lord Chief Justice Erle, in giving judgment in that case, says: “It must be assumed that the Court below found as a fact that the Company had directed that the acceptance of shares should be in the form appended to the articles of association. The judgment of the Court below proceeds on that ground. Assuming the fact to be found, we are bound to give the same judgment here. The case is distinguishable from those where persons have been held liable as shareholders by estoppel, because in none of the Acts of Parliament under which the questions have arisen has there been language similar to that here, viz., that ‘no person shall be deemed a shareholder’ unless he has complied with the requisitions of the Act.” [ERLE, C. J.—That was a most reluctant judgment.]

A rule nisi having been granted,

*Montagu Chambers*, Q. C., on a former day in this term, showed cause.—The question turns upon the construction of the 19th section of the 19 and 20 Vict. c. 47, and of the schedule Table B. (1). The 19th section enacts that “every person *who has accepted any share in a Company registered under this Act, and whose name is entered in the*  
\*486] *register of shareholders*, and no other person (except a subscriber to the memorandum of association in respect of the shares subscribed for by him), *shall for the purposes of this Act be deemed to be a shareholder.*” And the provision in the schedule is, that “no person shall be deemed to have accepted any share in the Company unless he has testified his acceptance thereof, by writing under his hand, in such form as the Company from time to time directs.” To constitute a party a shareholder, therefore, there must be an acceptance of the shares in writing; not, as here, a mere promise or agreement to do a future act. In truth nothing short of a formal acceptance of the shares, in writing, after they have been allotted, will satisfy the statute. The case of *The New Brunswick and Canada Railway and Land Company v. Muggeridge* is precisely in point. There, the letter of application was in exactly the form here adopted; and it was held not to amount to an acceptance. [ERLE, C. J.—The judgment of the Court of error was expressly limited to the assumption that the Company had directed a certain form of acceptance, which the defendant had not signed.] To hold that a mere application for shares is an acceptance of shares, will be opening a door to the very mischief the statute intended to remedy by this provision. Does the mere sending the letter amount to an acceptance? There is nothing ear-marked or ascertained. And the

mere fact of the defendant having paid calls does not estop him from showing that the requirements of the statute have not been complied with.

*Shee*, Serjt., in support of the rule.—The defendant applies by letter for 20 shares, paying the deposit, and agrees to accept that number of shares and to pay the calls thereon. The 20 shares are accordingly allotted to him, his name is inserted in the register of \*share- [\*487 holders, and he pays calls. Upon what principle, then, can it be said that the defendant has not accepted the shares? All that the schedule to the statute means, is, that, where the Company by its deed has provided a form of acceptance, that form must be used. In the case cited, there was a form directed by the Company, and the defendant refused to sign it, and, further, he had done no other act to testify his acceptance: no calls had been paid. [BYLES, J., referred to the 26th section, which enacts that “the register of shareholders shall be evidence of any matters by this Act directed or authorized to be inserted therein.”] It was assumed at the trial that the defendant had not signed any other paper than the letter of allotment, and that the Company had not directed or provided any other form of acceptance. The plaintiffs’ case therefore rested upon that letter, the allotment in pursuance of it, the payment of calls, and the register. *Cur. adv. vult.*

WILLES, J., now delivered the judgment of the Court: (a)—

This was an action for calls; and the question was whether the defendant had accepted the shares allotted to him by the plaintiffs, and in respect of which the calls were made, in such manner as is required by the 19 & 20 Vict. c. 47, to make him a shareholder. The defendant paid the deposit upon the shares in advance to the bankers of the Company, and applied for the shares by a letter which was in a printed form provided by the Company, and which, so far as could be done before allotment, did testify the defendant’s \*acceptance of the number [\*488 of shares mentioned therein, in the event of their being allotted to him by the Company. The letter of application was as follows:—

“To the directors of the Bog Lead Mining Company (Limited).

“Gentlemen,—Having paid to the Bank of London to your credit 5*l.*, being a deposit of 5*s.* per share on twenty shares in the above Company, I request you to allot me that number of shares, and I hereby agree to accept the same, and undertake to pay the amount of calls that may be made thereon, in accordance with the Company’s Act of incorporation.”

In compliance with this letter, the Company allotted to the defendant the number of shares applied for; and he in fact assented to such allotment, and paid two calls made prior to that now in question. The defendant never testified his acceptance of the shares, in writing under his hand, otherwise than by signing the letter of application; and the Company never “directed” any other form.

Upon these facts appearing at the trial before Wightman, J., at the last Kingston Assizes, the learned Judge, upon the authority of the case of *The New Brunswick Railway Company v. Muggeridge*, 4 Hurlst. & N. 160, 580,† which was relied upon by the defendant as in point, directed a nonsuit.

A rule was granted in last term to show cause why the nonsuit should

(a) The Judges present at the argument were Erle, C. J., Williams, J., Willes, J., and Byles, J.

not be set aside and a new trial had, upon the ground that the ruling of the learned Judge was erroneous.

Upon the argument, the defendant insisted that he had never become a shareholder; for, that, by the schedule to the Act, Table B. (1), "no person shall be deemed to have accepted any share in the Company, unless he has testified his acceptance thereof by writing under his hand \*489] in such form as the Company \*from time to time directs;" and that in this case no form of acceptance had been directed or subscribed, except the letter of application, which could not be construed, as an acceptance of the shares, because it preceded the allotment. And he insisted that nothing short of a formal acceptance of the shares after they were allotted could satisfy the statute.

The plaintiffs, on the other hand, argued, that, if the letter of application did not contain a sufficient acceptance, then there was no form of acceptance directed by the Company; in which case, by virtue of s. 9 of the Act, the schedule must be considered as disclaimed by and so inapplicable to this particular Company: and that, if the letter of application agreeing to take and accept a specific number of shares afterwards allotted could operate to testify an acceptance of the shares,—as they contended it could and did,—the statute was complied with.

In our opinion this latter argument ought to prevail; and we need express no opinion upon the former.

It may be, that, in the case of a contract for the purchase of unascertained property to answer a particular description, no acceptance can be properly said to take place before the purchaser has had an opportunity of rejection. In such a case, the offer to purchase is subject not only to the assent or dissent of the seller, but also to the condition that the property to be delivered by him shall answer the stipulated description. A right of inspection to ascertain whether such condition has been complied with is in the contemplation of both parties to such a contract; and no complete and final acceptance so as irrevocably to vest the property in the buyer can take place before he has exercised or waived that right. In order to constitute such a final and complete acceptance, the assent of the buyer should follow, not precede, that of \*490] \*the seller. But, where the contract is for a specific ascertained chattel, the reasoning is altogether different. Equally where the offer to sell and deliver has been first made by the seller and afterwards assented to by the buyer, and where the offer to buy and accept has been first made by the buyer and afterwards assented to by the seller, the contract is complete by the consent of both parties, and it is a contract the expression of which testifies that the seller has agreed to sell and deliver, and the buyer to buy and accept the chattel. And, indeed, it has been expressly decided, that, in this latter case, the Statute of Frauds may be satisfied by an acceptance preceding the delivery: *Cusack v. Robinson*, 7 Jurist, N. S. 542.

Now, it appears to us very clearly that a purchase of shares is analogous to that of a specific chattel, because the very thing to be purchased is ascertained by the offer contained in the letter of application, and the offer is subject to no other condition than the assent of the persons to whom it is made. Each share is a right to a fixed proportion of the profits of an existing undertaking subject to the payment of an ascertained amount of money when called for. Each share gives the same

rights as every other; and there is not necessarily even the distinction of separate numbers until the register is made up, if even then. The directors, therefore, by assenting to the letter of application in its terms, and allotting to the applicant so many shares as he has applied for, did give him the very thing for which he had asked, and of which he had by anticipation testified his acceptance.

To hold this not to be sufficient would be unnecessarily to introduce into the law an anomaly of a startling character, viz., that a contract in writing for the purchase of goods may be valid or invalid according as the offer has originated from the buyer or the \*seller. If a deed were drawn up for the sale and purchase of the shares, [\*491 incorporating the terms of the letters of application and of allotment, and signed and sealed by the applicant and the Company, would it testify the acceptance of the shares or not, according as it was first executed by the applicant or by the Company? Everybody will exclaim at the absurdity of the question: and yet it is only absurd because the execution of the deed by both parties would in either case obviously be but one transaction. And the letters of a correspondence constituting a bargain are equally one transaction; and, so long as there is a proposal by either party accepted by the other, there is a good contract in writing, because the letters testify the acceptance by each party of the terms agreed upon between them both.

In the case relied upon by the defendants, the statute was not complied with, because the Company had directed a form of acceptance other than and different from the letter of application; and that form so directed was not signed. The letter of application in that case was not intended to be the acceptance to satisfy the statute. Indeed, it was not even definite as to the number of shares to be taken; for, it only fixed the maximum. It is not, however, necessary to found our judgment upon this latter distinction, because for the first reason the authority relied upon by the defendants is inapplicable to the present case.

For the reasons above stated, we hold that the nonsuit was wrong, and that the rule for a new trial must be absolute. Rule absolute.

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**\*PEDLEY v. DAVIS and SHIPSTON. June 8. [\*492**

By a local Act (7 & 8 G. 4, c. cviii.), called The Abbey Lands Act, the owners and occupiers of lands in the district are empowered (by s. 13) to rate the owners and occupiers of abbey lands, for the purpose of raising funds for the repair of certain bridges. By s. 15, it is enacted, that, if any owner or occupier of any land in respect of which a rate has been imposed by virtue of the Act, shall refuse to pay the same, a justice, on proof of demand, may summon, and on due proof issue a distress-warrant. By subsequent sections, an appeal is given to any person claiming exemption, on the ground that the lands rated are not abbey lands; and the decision of the quarter sessions on such appeal is final.

The plaintiff having been rated in respect of lands which the jury found not to be abbey lands, and having refused to pay upon summons, D. a magistrate issued a distress-warrant, under which his goods were seized:—Held, that D. was not protected by Jervis's Act, 11 & 12 Vict. c. 44, s. 1, or by a similar clause in the local Act.

But, held, that the "collector of the abbey lands rate," to whom the distress-warrant was directed, was an "officer" within the meaning of the 24 G. 2, c. 44, s. 6.

THIS was an action against Davis, a magistrate, and Shipston, a collector of rates under a local Act, for seizing the goods of the plaintiff.

The defendant Davis pleaded "not guilty by statute,"—the statutes referred to in the margin of the plea being, the 11 & 12 Vict. c. 44, s. 1, Jervis's Act and the 7 & 8 G. 4, c. cviii. (the Abbey Lands Act), s. 48.

The defendant Shipston also pleaded "not guilty by statute,"—the statute referred to in the margin of his plea being the 24 G. 2, c. 44, s. 6, the Constables' Act. He also pleaded a justification, as follows:—

That the plaintiff, after the passing of an Act of Parliament made and passed in the eighth year of the reign of His late Majesty, King George the Fourth, intituled "An Act to enable the persons interested in the lands and hereditaments heretofore parcel of the possessions of the monastery or abbey of Stratford Langthorne, in the county of Essex, to raise money for repairing and maintaining the bridges and other works liable to be repaired and maintained by such persons," and at the time of the making of the rates and assessments hereinafter mentioned, and of the committing of the acts complained of, was the owner, proprietor, and occupier of divers lands, tenements, and hereditaments respectively theretofore parcel of the possessions of the monastery or abbey aforesaid, and as such \*subject and liable to be \*493] rated and assessed for the purposes of the said Act, as therein mentioned: that, at divers general meetings of the owners, proprietors, lessees, and occupiers of lands, tenements, and hereditaments before the passing of the said Act parcel of the possessions belonging to the said monastery or abbey, duly held in pursuance of the said Act, divers rates and assessments for the purposes of the said Act by the said owners, proprietors, lessees, and occupiers, were duly made in respect amongst others of the said lands, tenements, and hereditaments whereof the plaintiff was owner, proprietor, and occupier as aforesaid: that the plaintiff was duly rated in and by divers rates and assessments duly made for the purposes of the said Act, in divers large sums of money amounting in the whole, to wit, to 35*l.* 4*s.* 4*d.*, in respect of the lands, tenements, and hereditaments of which he was such owner, proprietor, and occupier as aforesaid: that tables of the said rates and assessments were duly made and signed as required by the said Act, and all things were done and happened, and existed to make the said rates and assessments valid in law, and the plaintiff became and was liable to the payment of the said rates: that, the plaintiff having neglected and refused to pay the same for the space of fourteen days after the same became due and demand thereof made by notice, as required by the said Act, under the hand of the collector, and the same remaining due and unpaid, and the plaintiff having been duly summoned by one of Her Majesty's justices of the peace for the county of Essex to appear before him at a time and place mentioned in such summons, and to show cause for such neglect and refusal, and proof of the said demand, neglect, and refusal upon oath being made before the said justice, and the plaintiff not hav- \*494] ing shown any sufficient cause for such neglect and refusal, \*or for the non-payment of the said moneys so rated and assessed, and the said moneys still remaining due, in arrear, and unpaid, the said justice issued his warrant under his hand and seal, pursuant to the said Act, directed to the collector of the Stratford Langthorne abbey land rates, and to all constables and other peace officers of the same county of Essex; and thereby, in Her Majesty's name, willed and required

them, or any of them, forthwith to levy the said several sums of money due from the plaintiff, and thereunder or thereafter respectively set at and opposite his name, and also, in pursuance of the statute in that case made and provided, the further sum of 10*l.* 10*s.* for the costs incurred therein, incident thereto, and in obtaining the warrant, by distress and sale of his goods and chattels (such goods and chattels being kept for the space of three days before the same were sold), rendering to the plaintiff the surplus, if any, the reasonable charges of such distress and sale and keeping being first deducted: Averment, that all things as required by the said Act and by law were done and happened and existed to authorize and empower the said justice to issue the said warrant, and to make the same a good and valid warrant and enforceable against the goods and chattels of the plaintiff for the said moneys in which he was so rated and assessed as aforesaid, and to be executed as thereafter mentioned: that the said warrant was afterwards delivered to the defendant Shipston, then and still being collector of the said rates and assessments so made as aforesaid, and being the said rates in the said warrant described as the Stratford Langthorne abbey land rates, to be executed in due form of law: that, in execution, and under and by virtue of and in obedience to the said warrant, and whilst the same was in force, he entered the said dwelling-house of the plaintiff, the outer door \*thereof being open, and took and seized the said goods of the plaintiff then in the said house, and executed the [\*495 said warrant, and levied the said moneys so thereby directed to be levied as aforesaid, as he lawfully might, which were the acts in the declaration complained of. Issue.

The sections of the Abbey Lands Act, 7 & 8 G. 4, c. cviii., upon which the case principally turned, were, the 13th, 15th, 16th, 36th, 42d, and 48th.

The 13th section enacts "that it shall and may be lawful for the owners, proprietors, lessees, and occupiers of the lands, tenements, and hereditaments aforesaid, from time to time, at any general or special general meeting to be held under this Act, to make any rate or assessment for the purposes of this Act, in respect of such lands, tenements, or hereditaments, by a pound-rate upon all such owners, proprietors, lessees, or occupiers, according to the rents or values of the respective lands, tenements, or hereditaments, and according to the several interests of the owners, proprietors, lessees, and occupiers thereof respectively, and to apportion such rates according to such several interests, and to moderate or regulate such rates with respect to any houses, new buildings, or improvements, in such manner as shall be agreed on by the major part of the persons present at any such quarterly or special general meeting; and a table of such rates and assessments, being from time to time made and signed by the persons, or the major part of them, present at any such meeting, shall be good and binding upon all such owners, proprietors, lessees, and occupiers respectively, and upon all other persons concerned."

The 15th section enacts, "that, if any owner, proprietor, lessee, or occupier of any messuage, land, tenements, or hereditaments upon or in respect of which any rate or assessment, or any arrears of rates or \*assessments heretofore made, or which shall be charged or im- [\*496 posed by virtue of this Act, shall neglect or refuse to pay the

rates and sums of money which shall have been or shall hereafter be so rated or assessed as aforesaid, for the space of fourteen days after the same shall be due, and demand thereof made by notice in writing or in print, under the hand of the collector of the said rates, to be delivered to such tenant or occupier, or left at his or her dwelling-house or usual place of abode in case such occupier reside within the limits of this Act, or otherwise left upon the premises in respect of which such rate or assessment shall be made, then, upon proof thereof upon oath before any justice of the peace for the said county of Essex (which oath such justice is hereby empowered and required to administer), the same shall and may be levied and recovered by distress and sale of the goods and chattels of every person so making default, by warrant under the hand and seal of such justice, such defaulter having been first duly summoned by such justice to appear before him at a time and place to be mentioned in such summons, and to show cause for such neglect or refusal; and the overplus (if any) to be raised by such distress or sale shall be returned, upon demand, to the owner of such goods and chattels, after deducting all reasonable costs and charges previous to and attending such distress and sale, such costs and charges to be ascertained and directed by the said justice; and, in default of such distress, it shall be lawful for such justice to commit such person to any house of correction for the county or place within which such offence shall be committed, there to remain without bail or mainprize for any time not exceeding three calendar months, unless payment shall be sooner made of such sum or sums of \*497] money as shall have been found to be due and in \*arrear upon all or any such assessment or assessments as aforesaid, together with all costs, charges, and expenses attending the recovery thereof, such costs, charges, and expenses to be ascertained and directed by the said justice."

The 16th section enacts "that every warrant of distress for the non-payment of any rates or assessments to be made under the Act shall be in the words or to the effect following:—'County of Essex, to wit. To the collector or collectors of [describing the place], and to all constables and other peace officers of the same county. Whereas,' &c., &c."

The 36th section enacts "that whenever, upon any appeal against any rate or assessment under this Act, the person or persons appealing shall claim to be exempt from such rate or assessment by reason that the lands, tenements, or hereditaments in respect of which such rate or assessment shall be made are not part and parcel of the lands, tenements, and hereditaments, or built upon land part and parcel of the lands, tenements, and hereditaments heretofore part and parcel of the possessions belonging to the said monastery or abbey of Stratford Langthorne, or for any other cause or reason, and which lands, tenements, or hereditaments, or the land or site of which said tenements or hereditaments, shall or may have been rated under the provisions of any existing or former Act of Parliament, and such rates have been paid, the whole proof of the exemption claimed and allegation made by the person or persons so appealing shall lie with and be upon such person and persons so appealing; and such person or persons, and the clerk or secretary of such owners, proprietors, lessees, and occupiers respectively, shall, and they are hereby directed and required, on all such appeals, and in all suits, actions, and other proceedings whatsoever under this Act, to

produce and show forth to the Court and jury or other persons before whom \*any such appeal, suit, action, or other proceeding shall be heard, all maps, deeds, &c., relating thereto," &c. [\*498]

The 42d section enacts, "that, on any appeal from any rate or assessment to be made for the purposes of this Act, the justices of the sessions where such appeal shall be heard shall and may amend the same in such manner as may be necessary for giving relief, without quashing or altering such rates or assessments with respect to the other persons mentioned in the same."

And the 48th section enacts, "that no action, suit, or information shall be brought or commenced against any person or persons for any matter or thing by him or them done under colour of or by the supposed authority of this Act, unless fourteen days' notice to the defendant or defendants shall have been given, or after sufficient satisfaction or tender thereof shall have been made to the party or parties aggrieved, or after three calendar months after the fact committed; and every such action, suit, or information shall be brought in the county or place in which the cause of complaint shall have arisen, and not elsewhere; and the defendant or defendants in any such action, suit, or information may plead specially, or the general issue, and give this Act and the special matter in evidence at any trial to be had thereupon, and that the same was done in pursuance and by the authority of this Act; and, if the same shall appear to have been so done, or if any such action, suit, or information shall be brought before such fourteen days' notice shall have been given as aforesaid, or after sufficient satisfaction made or tendered as aforesaid, or after the time limited for bringing the same as aforesaid, or shall be brought in any other county, city, or place than as aforesaid, then and in every such case the jury shall find for the defendant or defendants; and, if upon any verdict for the defendant in any action or suit, and upon such \*verdict, or if the plaintiff or plaintiffs shall be nonsuited, or shall discontinue his, her, or their action or suit after the defendant or defendants shall have appeared, or if upon demurrer judgment shall be given against the plaintiff or plaintiffs, the defendant and defendants shall and may recover treble costs, and have the like remedy for the same as any defendant or defendants hath or have for costs of suit in other cases by law." [\*499]

The cause was tried before Erle, C. J., at the last Spring Assizes for Kent. It appeared that the plaintiff had been rated as the owner of abbey lands part of the possessions of the Abbey of Stratford Langthorne, in the county of Essex, under the Abbey Lands Act, 7 & 8 G. 4, c. cviii.; and that the defendant Davis, a magistrate of the county, upon the application of Shipston, the collector, issued a distress-warrant against him to enforce the rate.

The jury having found that the lands in respect of which the distress was taken were not abbey lands, a verdict was entered for the plaintiff, damages 47*l.* 9*s.* 4*d.*, leave being reserved to the defendants to move to set it aside and to enter a verdict for them if the Court should be of opinion that they were within the protection of the statutes referred to.

*Bovill*, Q. C., in Easter Term last, obtained a rule nisi accordingly. —As to the defendant Davis, he submitted that he was protected by the 11 & 12 Vict. c. 44, the plaintiff having been rated under the Local Act (7 & 8 G. 4, c. cviii.) as an occupier of abbey lands, and not having

chosen to avail himself of the power of appeal given by the Local Act: and, as to the defendant Shipston, that he was bound to execute the warrant addressed to him, and therefore within the protection of the 24 \*500] G. 2, c. 44, s. 6; and he referred to *Nutting v. Jackson*, Bull. N. P. 24 (cited 7 T. R. 271, 275), and *Harper v. Carr*, 7 T. R. 270, where overseers distraining for a poor-rate under a warrant of magistrates were held to be protected by the last-mentioned statute.

*Lush*, Q. C., and *J. C. Matthew*, on a former day in this term, showed cause.—The jury here have found that the plaintiff was not an owner or occupier of abbey lands, and therefore he was not liable to be assessed at all under the Local Act, and the magistrate had no jurisdiction to grant the warrant. The magistrate's duty under the Local Act was the same as under the 43 Eliz. c. 2, in the case of a poor-rate, viz. to summon the party and hear what he had to say in his defence: *Harper v. Carr*, 7 T. R. 270. At common law, the magistrate was clearly responsible for issuing a warrant for a poor-rate for which the party was not liable, having no land in the parish in which the rate was made: *Weaver v. Price*, 3 B. & Ad. 409 (E. C. L. R. vol. 23). That case is precisely in point, unless there is anything in *Jervis's Act*, 11 & 12 Vict. c. 44, to protect the magistrate; for, the Local Act gives him a special jurisdiction to enforce an assessment against the owners of abbey lands only. That Act, however, only relieves the magistrate as to warrants to enforce poor-rates, leaving him as to other matters as before. The 1st section recites that "it is expedient to protect justices of the peace in the execution of their duty;" and then it enacts "that every action hereafter to be brought against any justice of the peace for any act done by him in the execution of his duty as such justice, with respect to any matter within his jurisdiction as such justice, shall be an action on the case as for a tort; and in the declaration it shall be expressly alleged that such act was done maliciously, and without \*501] \*reasonable and probable cause; and if at the trial of any such action, upon the general issue being pleaded, the plaintiff shall fail to prove such allegation, he shall be nonsuit, or a verdict shall be given for the defendant." The 2d section enacts, "that, for any act done by a justice of the peace in a matter of which by law he has not jurisdiction, or in which he shall have exceeded his jurisdiction, any person injured thereby or by any act done under any conviction or order made or warrant issued by such justice in any such matter, may maintain an action against such justice in the same form and in the same case as he might have done before the passing of this Act, without making any allegation in his declaration that the act complained of was done maliciously and without reasonable or probable cause: Provided, nevertheless, that no such action shall be brought for anything done under such conviction or order until after such conviction shall have been quashed either upon appeal or upon application to Her Majesty's Court of Queen's Bench; nor shall any such action be brought for anything done under such warrant which shall have been issued by such justice to procure the appearance of such party, and which shall have been followed by a conviction or order in the same matter, until after such conviction or order shall have been so quashed as aforesaid; or, if such last-mentioned warrant shall not have been followed by any such conviction or order, or if it be a warrant upon an information for an alleged indictable offence, nevertheless, if a

summons were issued previously to such warrant, and such summons were served upon such person, either personally or by leaving the same for him with some person at his last or most usual place of abode, and he did not appear according to the exigency of such summons, in such case no such action shall be maintained against such justice for anything \*done under such warrant." If this section had already pro- [\*502 tected the magistrate, the 4th section would have been wholly unnecessary. It enacts, "that, where any *poor-rate* shall be made, allowed, and published, and a warrant of distress shall issue against any person named and rated therein, no action shall be brought against the justice or justices who shall have granted such warrant, by reason of any irregularity or defect in the said rate, or by reason of such person not being liable to be rated therein." It then goes on to deal with another class of cases,—“and that, in all cases where a discretionary power shall be given to a justice of the peace by any Act or Acts of Parliament, no action shall be brought against such justice for or by reason of the manner in which he shall have exercised his discretion in the execution of any such power.” This is not a case where any discretion is given to the magistrate. He had no power to inquire. The 5th section assumes that the magistrate is liable where he issues a warrant without authority. It begins with a recital that “it would conduce to the advancement of justice, and render more effective and certain the performance of the duties of the justices, and give them protection in the performance of the same, if some simple means, not attended with much expense, were devised by which the legality of any act to be done by such justices might be considered and adjudged by a Court of competent jurisdiction, and such justice enabled and directed to perform it without risk of any action or other proceeding being brought or had against him:” and then it proceeds to enact, “that, in all cases where a justice or justices of the peace shall refuse to do any act relating to the duties of his or their office as such justice or justices, it shall be lawful for the party requiring such act to be done to apply to Her Majesty’s Court of Queen’s Bench, upon \*an affidavit of the facts, for a rule calling upon such justice or [\*503 justices, and also the party to be affected by such act, to show cause why such act should not be done; and if, after due service of such rule, good cause shall not be shown against it, the said Court may make the same absolute, with or without or upon payment of costs, as to them shall seem meet; and the said justice or justices, upon being served with such rule absolute, shall obey the same, and shall do the act required: and no action or proceeding whatsoever shall be commenced or prosecuted against such justice or justices for having obeyed such rule and done such act so thereby required as aforesaid.” [WILLIAMS, J.—In *Fawcett v. Fowles*, 7 B. & C. 394 (E. C. L. R. vol. 14), 1 M. & R. 102 (E. C. L. R. vol. 17), in trespass against two magistrates for breaking and entering the plaintiff’s close in the parish of A., and seizing his sheep, it appeared that the defendants, upon the complaint of the surveyor of the highways appointed for the whole parish, convicted the plaintiff of neglecting to do statute duty, and issued a warrant to levy the penalty, under which the act complained of was done: and it was held, that the conviction, being good upon the face of it, was a sufficient defence, and that the plaintiff could not in that action try the question whether the land which he occupied was exempt from the burthen of

repairing the roads in other parts of the parish.] Lord Tenterden there takes the distinction. He says: "For some time I was disposed to think this case analogous to some that have arisen on the poor-laws, in which it has been held, that, if a person not an occupier or resident within a given parish be there rated to the relief of the poor, and his goods are distrained for the rate, he may maintain an action against the party levying.<sup>(a)</sup> But, in those \*cases, *there was an entire want* \*504] *of jurisdiction*. Here, the justice *had* jurisdiction to hear and decide upon the complaint of the surveyor, and the present plaintiff, *as an occupier of lands within the parish*, was *prima facie* liable to the burden imposed:" and see *The Queen v. Browne*, 13 Q. B. 654 (E. C. L. R. vol. 66); *The Queen v. Pilkington*, 2 Ellis & B. 546 (E. C. L. R. vol. 75). In the present case, the magistrate had no jurisdiction. The Local Act gives him none. This matter was discussed since Jervis's Act in the Court of Exchequer in *Newbould v. Coltman*, 6 Exch. 189.† The poor law commissioners in 1837, by an order, directed nine parishes, townships, and places to be formed into a union to be called the Pateley Bridge Union, for the administration of the law for the relief of the poor. In the margin of the order were enumerated eleven townships,—first, Bewerley,—secondly, Dacre, &c.; and the commissioners ordered that a board should be constituted, according to the provisions of the Poor Law Amendment Act (4 & 5 W. 4, c. 76). fourteen to be the number of guardians, three for Bewerley, two for Dacre, &c., treating them as separate townships. They then directed them to contribute to a common fund for the purpose of providing a workhouse, &c., and afterwards fixed the proportions payable by each township or place. In 1848, the chairman and guardians of the union made an order on the plaintiff and three others, as overseers of the parish of Dacre-cum-Bewerley (treating the two as one township) for payment of 500*l.* by way of contribution towards the relief of the poor, &c. This order having been disobeyed, the defendants, who were magistrates, issued their summons to the plaintiff and the other overseers, as overseers of Dacre-cum-Bewerley, and afterwards issued a warrant of distress, under which the plaintiff's goods were taken. In an action of *trespass* against \*505] the \*defendants for a seizure of the plaintiff's goods under this warrant,—it was held,—first, that the 2 & 3 Vict. c. 84, s. 1, gave to the magistrates a power similar to that exercised by them in enforcing a legal poor-rate; but that, in the absence of a legal obligation to pay the contribution by the party whose goods had been seized, the magistrates had acted without jurisdiction, and were liable,—secondly, that, if they acted under such circumstances, they were liable in an action of *trespass*, and that Jervis's Act, which in certain cases makes a magistrate liable in an action on the case only, did not apply. Here, the magistrate acted wholly without jurisdiction. The statute does not give him any power to determine the question. He has a particular limited jurisdiction to deal with abbey lands only: and, though an appeal is given against the assessment of the abbey landowners, none is given against the decision of the magistrate: see *The Churchwardens of Birmingham v. Shaw*, 10 Q. B. 868, 881 (E. C. L. R. vol. 59). Where an Act of Parliament empowers certain persons to deal

(a) See *Nichols v. Walker*, Cro. Car. 324, *Milward v. Caffyn*, 2 W. Bl. 1331, Lord Amherst & Lord Somers, 2 T. R. 372.

with their own property, or with property in a certain place or district, or defined by a certain description, and does not by express words or by necessary implication import that the legislature intended to affect the rights of other persons in other property, Courts of law do not construe mere general words in the Act as affecting the rights of strangers as to property not within the description of that with which the Act expressly purports to deal: *Dawson v. Paver*, 5 Hare 415.

Then, as to Shipston, the collector. He is appointed at a salary by the owners of abbey lands to collect the rates: but he is not an officer in the sense of the word as used in the 24 G. 2, c. 44, s. 6. The words are, "no action shall be brought against any constable, head-borough, or other officer, &c., for anything done in obedience to any warrant," &c. "Other officer" there must \*mean ejusdem generis with those [\*506 before mentioned, viz., officers having some public duty to perform, not persons who choose to accept a private office or employment. [BYLES, J.—An overseer has been held to be an officer within that provision.] He has a public duty to perform: he is bound to collect the rates; and he is only protected where he has acted strictly in obedience to the warrant: *Kay v. Grover*, 7 Bingh. 312 (E. C. L. R. vol. 20), 3 M. & P. 634. [WILLIAMS, J.—Did not the magistrate order the collector in his official capacity to seize?] No doubt he did: but still he is a volunteer; he was not bound to take upon himself the office. [BYLES, J.—A gaoler is a public officer: but he may resign.] So may a policeman. In *Jones v. Vaughan*, 5 East 445, 448, Lawrence, J., says: "The object of the clause in question was, the protection of those officers who are charged with the execution of magistrates' warrants, who before that time were subject to indictment if they did not execute the warrants directed to them, or to vexatious actions if they did." In *Harper v. Carr*, 7 T. R. 274, Lord Kenyon refers to a case of *Wilkes v. Lord Halifax*, where it was held that the statute did not extend to a king's messenger.(a)

*Borill*, Q. C., *Garth* and *Murphy*, in support of the rule.—The defendant Davis clearly had authority to issue this warrant. His duty was not merely ministerial: he was bound to satisfy himself, as under the statute of Elizabeth, that the rate was due: per Lawrence, J., in *Harper v. Carr*, 7 T. R. 276. If the party is assessed, and refuses to pay, and does not choose to avail himself of his powers of appeal, there is nothing further to inquire into. The 36th section of the Local Act contemplates an appeal on the ground that the \*premises rated [\*507 are not abbey lands. [WILLIAMS, J.—The effect of s. 36 is, only to alter the course of evidence where there has been a payment made.] The fact of occupier or not, is not to be raised before the magistrate. In *Allen v. Sharp*, 2 Exch. 352,† it was held that an assessment under the assessed tax acts is final and conclusive unless appealed against in the manner prescribed by the 43 G. 3, c. 99, s. 24: therefore, where a party was assessed to the duty imposed on "horse-dealers," it was held that the decision of the assessor that the party was a horse-dealer, however erroneous, could not be questioned in an action. In *Newbould v. Coltman*, 6 Exch. 189,† there was nobody on whom the assessment could be made: there was no power of appeal there. In *The Luton Local Board of Health, app., Davis, resp.*, 29 Law J., M. C. 173, a special district rate, good on the face of it, was duly made and pub-

(a) See *Entick v. Carrington*, 2 Wilson 275.

lished under the Public Health Act, 1848 (11 & 12 Vict. c. 63): on a summons before justices to enforce payment of it, it was objected that it was made for the purpose of paying off money advanced for works which were not "permanent" within ss. 86 and 107, for which alone a special district rate could be made, and that the rate was therefore void: and it was held that the objection was ground only of appeal to the Quarter Sessions, and that, the rate being unappealed against, the justices were bound to issue a warrant of distress. Crompton, J., there says: "As soon as it is shown that the objection to the rate was subject-matter of appeal, there is an end of the case; for, on appeal, the same course is left open to parties aggrieved as in the case of poor-rates, and the same power is given to the Quarter Sessions to amend. It was said in argument that the local board had no jurisdiction to make the rate, if the work was not of a permanent nature. Their jurisdiction was, to \*508] determine that very matter, subject to being reviewed by \*appeal to Quarter Sessions. The rate, therefore, was not void, and the justices had jurisdiction, and were bound to enforce it. It is true, that, as was held in *Milward v. Caffin*, 2 W. Bl. 1330, a rate is void which is made on a person in respect of land not in his occupation: but that is the exception to the rule that a rate, good on the face of it, and unappealed against, cannot be resisted." So, here, the rate having been made, and no appeal, the magistrate could not decline jurisdiction. His jurisdiction cannot depend upon facts which are not brought before him. The words "exceeding his jurisdiction" in s. 2 of the 11 & 12 Vict. c. 44, mean doing something which the justice could by no possibility have a legal right to do: *Ratt v. Parkinson*, 20 Law J., M. C. 208. In *The Queen v. Bradshaw*, 29 Law J., M. C. 176, it was held by the Court of Queen's Bench, that, on a summons before justices to enforce a poor-rate, as soon as the person summoned is shown to be in the visible occupation of the property rated within the parish, the justices are bound to issue a warrant of distress, and cannot go into the question of whether or not the occupation is beneficial, which is matter only for the Quarter Sessions on appeal. The like was held by this Court in *The Mersey Docks v. Cameron*, 9 C. B. N. S. 812 (E. C. L. R. vol. 99).

Then, as to the defendant Shipston,—the warrant was directed to him, and he acted in pursuance of his duty in seizing under it, and is clearly within the protection of the 24 G. 2, c. 44, s. 6, as much as the overseer, who has no duty to levy the poor-rate, except in obedience to the magistrate's warrant. In *Harper v. Carr*, 7 T. R. 274, Lord Kenyon says: "It is objected that the statute does not extend to churchwardens and overseers, but is confined to the officers of the peace: but, if that be the meaning of the statute, all mankind have been acting \*509] under a mistake ever since \*it passed; for, it has always been extended to surveyors of the highway." And Ashhurst, J., says: "This is a very wise provision made for the protection of all inferior officers acting under the warrant of a justice of the peace." [ERLE, C. J.—I incline to think that the collector would be indictable for refusing to execute the warrant.] In *Wallace v. The Treasurer of the West India Dock Company*, 5 East 115, it was held that the treasurer of the West India Dock Company was an officer within the protection of the statute. *Cur. adv. vult.*

ERLE, C. J., now delivered the judgment of the Court:—

In this case the plaintiff had been rated as the owner of abbey land, and the defendant Davis issued a distress-warrant to compel payment of that rate, and the defendant Shipston levied under that warrant; and the jury have found that the land was not abbey land, and so the question is raised whether the defendant Davis is protected as justice, or the defendant Shipston as an officer acting in execution of a warrant.

With respect to the case of the justice,—the 7 & 8 G. 4, c. cviii., s. 13, enables the owners of abbey lands to make a rate upon the owners of abbey lands; and s. 15 enacts, that if any owner of any land in respect of which a rate has been imposed by virtue of the Act shall refuse to pay, a justice, on proof of demand, may summon, and in due course issue a distress-warrant. If these were all the material facts, it would be clear that the justice had acted without jurisdiction, and would be liable in trespass.

The ownership of abbey lands is as essential to give jurisdiction to make the rate in question, as occupation of lands within the parish is for a poor-rate: and it is \*clear that trespass lay before the 11 & 12 Vict. c. 44, s. 4, for levying a poor-rate, where the complainant [\*510 had no lands within the parish: *Nicholls v. Walker*, Cro. Car. 394; *Milward v. Caffin*, 2 W. Bl. 1330; *Newbould v. Coltman*, 6 Exch. 195.† The last case bears a strong analogy to the present. There, the statute provided, that, “in every case in which a contribution from overseers required by a board of guardians shall be in arrear, the justices may summon and in due course issue a warrant if they shall think fit;” and the question considered was, whether the jurisdiction of the justices extended to inquire into the validity of the order of the board of guardians and of the appointment of the overseers, or was confined to enforcing payment of sums assumed to be legally due: and the decision is, that the existence of a legal obligation to pay the sum claimed is a necessary preliminary condition to the magistrates’ having any jurisdiction at all; and therefore they have no jurisdiction to decide on the validity of the order; but, if the order is legally made, and the party is in arrear, they may issue a warrant or not, as the circumstances shall in their discretion seem to require.

This reasoning is directly applicable to the 15th section above recited relating to rates on abbey lands, under which the justice is directed to begin by inquiring whether the rated owner has refused to pay, not whether the rate is valid. This case answers many of the arguments relied on for the defendant here. If the question is not within the jurisdiction of the magistrate, his adjudication thereon is not conclusive for him in an action. If he has a discretion to grant or refuse a distress-warrant, he may consider whether there is reasonable ground to doubt the validity of the rate; and, if he does so doubt, he may exercise his discretion in refusing a distress-warrant, \*and then the parties [\*511 may proceed by rule, or by indemnity to the justice, if they wish to try the validity of the rate, at the usual risk of costs: but, if the justice refuses to issue a distress-warrant because he doubts the validity of the rate, he does not therefore adjudicate thereon as on a matter within his jurisdiction for adjudication.

That decision further affirms, that in the case of a warrant so issued without jurisdiction, the justice is not within the operation of the 11 & 12 Vict. c. 44, s. 1, relating to actions on the case, but is within s. 2,

relating to actions of trespass for acting where there is no jurisdiction, and is not within s. 4, relating to poor-rates and the exercise of discretionary powers.

The distinction between *Newbould v. Coltman* and the present case, if any, arises from the 36th section of the 7 & 8 G. 4, enacting that, if the appellant in any appeal against a rate shall claim to be exempt because the lands are not abbey lands, and he shall have paid a former rate, the burden of proof of the exemption shall be borne by him; followed by the 42d, making the decision of the Quarter Sessions upon appeal final and conclusive. It was contended that the Court of appeal had by this section jurisdiction to try the claim of exemption on the ground that the lands are not abbey lands; and, if so, that it was a legal consequence that the tribunal appealed from should be considered to have by implication the same jurisdiction. But we do not collect that intention from the language of the section. It is not probable that the legislature would subject all lands to a liability to be rated by the owners of abbey lands, having an interest to make the contributors as numerous as possible, and preclude the owners from the ordinary recourse to the general law. It may be that a party electing to appeal \*512] may be bound finally, and still if he elects to try the \*question by action he may do so. The effect of appealing is not now for us to decide: and we are clear that the language of the 15th section, creating the jurisdiction in the justice to issue the warrant, does not express any intention to give him jurisdiction to try the validity of the rate: and we therefore think that the plaintiff had a right to try the validity of the rate by an action of trespass.

It was said that he might try the right by an action for money had and received. It suffices to say in answer, that we see many difficulties in so raising the question.

It was further contended, that, as the plaintiff might have tried this question upon appeal, he was therefore bound to appeal, and could not bring an action for a matter which was ground of appeal: and the case of *The Churchwardens of Birmingham v. Shaw*, 10 Q. B. 868 (E. C. L. R. vol. 59), was cited. But, in the judgment in that case, the distinction is clearly taken between cases on the one hand where there is jurisdiction to make the rate, and the party has a ground of appeal against a rate made with jurisdiction, and cases on the other hand where there was no jurisdiction to make the rate, and so no jurisdiction to issue the distress-warrant; and it is laid down, that, if in the first instance the Court has gone beyond its jurisdiction, the act is void. The party grieved may, if he pleases, appeal, because excess of jurisdiction is as much a ground of appeal as a merely erroneous decision; and, if the Court of appeal erroneously confirms the act of the Court below, it may be that the party appealing cannot object to the want of jurisdiction, in any collateral proceeding. His own act may estop him personally. But he is not bound to appeal: he is at liberty to treat the act as void."

This reasoning, we think, applies to the case before us, and answers the objection that the plaintiff was bound to appeal. Our judgment \*513] therefore is, that the \*plaintiff is entitled to keep his verdict against the defendant Davis.

With respect to the defendant Shipston, we think he is protected by

the 24 G. 2, c. 44, s. 6, enacting that no action should be brought against any constable, headborough, or *other officer*, for anything done in obedience to a warrant, without compliance with certain provisions which need not be specified. The question being whether Shipston was an "officer" within the meaning of this section, the plaintiff contended that he was the private agent of the owners of abbey lands, collecting money for them in their private capacity, and not entitled to the protection due to officers of the law acting in execution of the law. But, as the statute requires the warrant to be directed to the collector, and requires the collector to execute the same, he comes within the principle of the protection created by the statute. He is acting in execution of the law. He is bound to obey the command in the warrant; and, although he may resign his office, and avoid receiving a warrant, he is not the less acting under legal compulsion if he is an officer and receives the warrant. We consider that the decisions extending the protection to churchwardens and overseers executing a warrant of distress for a poor-rate, according to *Nutting v. Jackson*, Bull. N. P. 24, and *Harper v. Carr*, 7 T. R. 270, authorize us to hold that the collector executing the warrant of distress in this case is protected.

The result is, that the rule is made absolute as to the defendant Shipston, and discharged as to the defendant Davis.

Rule accordingly.

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**\*SAUNDERS v. KIRWAN. June 10. [\*514**

In an action for false imprisonment and malicious prosecution, the plaintiff having recovered less damages than 5*l.*, the Judge certified, under the 23 & 24 Vict. c. 126, s. 34, as follows:—

"I certify that this action was not really brought to try a right besides the mere right to recover damages, that the trespass was not malicious" (omitting "wilful and"), "and that the action was not fit to be brought:—"Held, that the certificate was sufficient.

THIS was an action for false imprisonment and malicious prosecution tried before Erle, C. J., at the sittings at Westminster after last term, when a verdict was found for the plaintiff with 40*s.* damages, and his Lordship certified on the back of the record, as follows:—

"I certify that this action was not really brought to try a right besides the mere right to recover damages, that the trespass *was not malicious*, and that the action was not fit to be brought."

*Thomas*, Serjt., now moved for a rule calling on the defendant to show cause why the master should not proceed to tax the plaintiff his costs, on the ground that the certificate was inoperative to deprive him of costs. The provision under which this certificate was given, is, the 34th section of the Common Law Procedure Act, 1860, 23 & 24 Vict. c. 126, which enacts, that, "When the plaintiff in any action for an alleged wrong, in any of the superior Courts, recovers by the verdict of a jury less than 5*l.*, he shall not be entitled to recover or obtain from the defendant any costs whatever in respect of such verdict, whether given upon any issue or issues tried, or judgment passed by default, in case the Judge or presiding officer before whom such verdict is obtained shall immediately afterwards certify on the back of the record, or on the writ of trial or writ of inquiry, that the action was not really brought to try a right besides the

mere right to recover damages, and that the trespass or grievance in respect of which the action was brought was not *wilful and malicious*, \*515] and that the action was not fit to \*be brought." Here, the certificate negatives that the trespass in respect of which the action was brought was *malicious*, but not that it was *wilful*. [WILLES, J.—This clause was framed with reference to the 2d section of the 3 & 4 Vict. c. 24, which, to entitle the plaintiff to costs in a case like this, required a certificate that the action was really brought to try a right besides the mere right to recover damages for the trespass or grievance for which the action should have been brought, or that the trespass or grievance in respect of which the action was brought was *wilful and malicious*. Under this Act, the Judge is to certify that the action was *not* really brought to try a right besides the right to recover damages, and that the trespass or grievance in respect of which the action was brought was *not wilful and malicious, &c.*] To deprive the plaintiff of costs, the three things must concur, viz., that the action was not brought to try a right besides the mere right to recover damages,—that the trespass or grievance in respect of which the action was brought was not *wilful and malicious*,—and that the action was not fit to be brought.

ERLE, C. J.—I think the certificate in this case is sufficient in point of form, and that there should be no rule. The 34th section of the 23 & 24 Vict. c. 126, enacts that the plaintiff in an action for an alleged wrong, where he recovers less than 5*l.* damages, shall not recover any costs, in case the Judge shall certify that the action was not really brought to try a right besides the mere right to recover damages, and that the trespass or grievance in respect of which the action was brought was not *wilful and malicious*, and that the action was not fit to be brought. If the trespass was *wilful and malicious*, the plaintiff is to have costs: but, if it is not both *wilful and malicious*, he is not to \*516] \*have costs. I think a certificate that the trespass was not *malicious* is sufficient to deprive the plaintiff of costs. To entitle the plaintiff to costs, it must be both *wilful and malicious*. This is clear from the language of the former statute.

WILLIAMS, J.—I am of the same opinion. In order to give the plaintiff costs, the Judge must negative that the trespass in respect of which the action is brought was *wilful and malicious*. If the action has not both these qualities, the plaintiff is not to have costs.

WILLES, J., concurred.

BYLES, J.—I am of the same opinion. The distinction between the 3 & 4 Vict. c. 24, s. 2, and the 34th section of the 23 & 24 Vict. c. 126, is, that, under the former, the Judge, in order to give the plaintiff costs, was to certify *affirmatively* that the action was really brought to try a right besides the mere right to recover damages for the trespass or grievance for which the action was brought, *or* that the trespass or grievance in respect of which the action was brought was *wilful and malicious*; whereas, under the later Act, he is to certify *negatively*, to deprive the plaintiff of costs, that the action was *not* really brought to try a right besides the mere right to recover damages, *and* that the trespass or grievance in respect of which the action was brought was *not wilful and malicious, and* that the action was not fit to be brought. It is enough, therefore, if the certificate under the recent Act negatives

either wilfulness or malice. The words "wilful and malicious" may be read as a compound adjective, "wilfully malicious." It is not necessary to negative both wilfulness and malice. Rule refused.

**\*DE PASS and Others v. BELL and Another. May 31. [\*51]**

M., in March, 1859, consigned oats to the correspondents of the plaintiffs at Melbourne for sale, the proceeds to be remitted to the plaintiffs, and against this consignment the plaintiffs accepted in favour of M. a bill at four months for 600*l.*, it being agreed that the plaintiffs should be repaid that sum out of the proceeds of the sale of the oats,—any deficiency to be made good by M., who was also to pay interest to the plaintiffs on the 600*l.* from the time the bill became due till the arrival in this country of the proceeds of the oats. In June, 1859, M. became bankrupt, the plaintiffs' acceptance remaining in his hands unnegotiated. The assignees of M. took possession of the bill, and paid it into the Bank of England, to the credit of the accountant in bankruptcy, for the estate of M.; and the bill was presented to the plaintiffs' bankers at maturity (July, 1859), and paid by them, the plaintiffs being in ignorance of the fact of its having remained in M.'s hands unnegotiated. The account sales of the shipment were received from Melbourne in March, 1860, showing that M.'s estate had been overpaid to the extent of 269*l.* 4*s.* 6*d.*:—

Held, that the plaintiffs were not under the circumstances entitled to recover back that money from the assignees.

THIS was an action brought by the plaintiffs against the defendants to recover 269*l.* 4*s.* 6*d.*; and the following case was stated by consent, under a Judge's order, for the opinion of the Court:—

The plaintiffs are merchants trading in London under the name of De Pass & Sons, and also agents for a firm at Melbourne, in Australia, trading under the name of De Pass, Brothers, & Co.

The defendant Bell is the official assignee, and the defendant Woodhouse the creditors' assignee, of the estate and effects of John Lockhart Morton, who was adjudicated a bankrupt in June, 1859.

In the early part of March, 1859, the said J. L. Morton, with whom the plaintiffs had not previously had any acquaintance or business transactions, arranged with the plaintiffs that they should consign for him a cargo of oats to the said De Pass, Brothers, & Co., at Melbourne, to be sold by them, and the proceeds of the sale to be remitted to the plaintiffs, and that the plaintiffs should accept a bill for 600*l.* at four months, drawn by him upon them against this consignment. The plaintiffs were to be repaid the amount of this bill out of the proceeds of the goods; the deficiency, if any, to be made good by Morton, who was also to pay interest to the plaintiffs on the 600*l.* from \*the time the bill [\*518 became due till the arrival in this country of the proceeds of the goods.

In pursuance of this arrangement, Morton, on the 17th of March, 1859, delivered to the plaintiffs the shipping documents of this cargo of oats, invoiced by Morton at 895*l.* 15*s.* 8*d.*, which the plaintiffs duly consigned to De Pass, Brothers, & Co., at Melbourne, and insured at a premium of 22*l.* 12*s.*

On the same 17th of March, the plaintiffs accepted the bill for 600*l.* at four months, drawn upon them by Morton, and payable to Morton or order, at the plaintiffs' bankers, Messrs. Prescott, Grote & Co.

In April, 1859, the said John Lockhart Morton also consigned through the plaintiffs a cargo of deals to De Pass, Brothers, & Co., at Melbourne,

value 447*l.* 9*s.* 4*d.* Against this consignment he drew a bill upon the plaintiffs for 50*l.* at six months' date, which they declined to accept.

In June, 1859, Morton was adjudicated a bankrupt.

At the time of his bankruptcy, Morton had not negotiated the plaintiffs' acceptance for 600*l.*, which was taken possession of by the defendants as his assignees, and paid by them into the Bank of England, to the credit of the accountant in bankruptcy, for the estate of the said bankrupt. The bill, when due, was duly presented for payment at Messrs. Prescott & Co.'s by the Bank of England, and paid by them as the plaintiffs' bankers.

The plaintiffs had not given Messrs. Prescott & Co. directions not to pay the bill. They did not know at the time the bill was paid that it was held and presented for payment by the Bank of England on behalf of the estate of the bankrupt Morton: but they knew that Morton had been adjudicated bankrupt.

In the ordinary course of business, the goods would have been sold \*519] by the plaintiffs' agents at the time of \*the bill of exchange becoming due: but the plaintiffs could not have and had not then received information of such sale.

Account sales of the oats and deals were received by the plaintiffs from De Pass, Brothers, & Co. in March, 1860, showing the net proceeds of the sales to be the sum of 378*l.* 19*s.* 5*d.*

Upon the receipt of these account sales, the plaintiffs sent to the defendant Bell, the official assignee, an account of which the following is a copy:—

*The official assignee in re Estate of John Lockhart Morton,  
in account with De Pass & Sons.*

1859.	DR.	£	s.	d.			
March 17.	To acceptance due July 20 . .	600	0	0			
18.	To insurance 1075 <i>l.</i> and stamps	22	12	0	622	12	0
1860.	CR.						
March 3.	By net proceeds oats . . . .	140	3	9			
	By " deals . . . .	238	15	8			
	In a draft for .	378	19	5			
at 60 days' sight from March 6, due May 8.							
Deduct interest 5 per cent.							
	417 days on 22 <i>l.</i> 12 <i>s.</i> .	£	1	6	3		
	293 days on 600 <i>l.</i> .		24	1	8		
Bill stamps . . . . .		0	4	0	25	11	11
					353	7	6
	Balance due . . . . .				£269	4	6

At the same time, the plaintiffs requested the said official assignee to pay to them the balance 269*l.* 4*s.* 6*d.*, as shown by the above account.

The defendants had no previous notice of the circumstances under which the bankrupt had received the bill, and denied their liability to make this payment.

The plaintiffs have never received any value for their acceptance, except so far as appears from the facts stated in this case.

\*520] \*The question for the opinion of the Court was, whether the defendants were liable, under the circumstances stated in this case, to pay to the plaintiffs the sum of 269*l.* 4*s.* 6*d.*, or any part of it.

If the Court should be of opinion in the affirmative, the judgment was to be entered up for the plaintiffs for such sum as the Court should think the defendants were liable to pay, and for costs of suit. If the Court should be of opinion in the negative, then judgment of nol-pros., with costs of defence, was to be entered up for the defendants.

The Court were to be at liberty to draw any inferences of fact.

*Lush*, Q. C. (with whom was *R. E. Turner*), for the plaintiffs.(a)—The short facts are these:—Morton, the bankrupt, consigned a cargo of oats to the correspondents of the plaintiffs at Melbourne for sale, the proceeds to be remitted to the plaintiffs, and against this consignment the plaintiffs accepted in favour of Morton a bill at four months for 600*l.*, it being agreed that the plaintiffs should be repaid that sum out of the proceeds of the sale of the oats,—any deficiency to be made good by Morton. In June, 1859, Morton became bankrupt, the plaintiffs' acceptance remaining \*in his hands unnegotiated. The [\*521 assignees took possession of the bill, and paid it into the Bank of England to the credit of the accountant in bankruptcy, for the estate of the bankrupt; and the bill was presented to the plaintiffs' bankers at maturity (July, 1859), and paid by them, the plaintiff being in ignorance of the fact of its having remained in Morton's hands unnegotiated. The account sales of the shipment were received from Melbourne in March, 1860, showing that the bankrupt's estate had been overpaid to the extent of 269*l.* 4*s.* 6*d.* Under these circumstances, it is submitted, that, inasmuch as Morton himself, if no bankruptcy had supervened, would not have been entitled to claim from the plaintiffs payment of the whole sum of 600*l.*, his assignees could be in no better position. [WILLIAMS, J.—An acceptance of a bill against a consignment is in effect an advance of so much money upon the goods.] That will, no doubt, be the argument upon the other side. [WILLES, J.—It is not unusual in these cases to stipulate for a renewal of the bills provided the goods remain unsold when the bills arrive at maturity. We cannot, however, assume that there was any such stipulation here, the case being silent on the subject.]

*Hannen*, contra,(b) was stopped by the Court.

(a) The points marked for argument on the part of the plaintiffs were as follows:—

"1. That the plaintiffs paid their acceptance to the Bank of England on behalf of the defendants, under a mistake of facts:

"2. That, the bill having been accepted under a special contract with the bankrupt that he was to repay the plaintiffs the difference, if any, between the amount of the bill and the proceeds of the cargo, if those proceeds were less than the amount of the bill, the defendants, by presenting and receiving payment of the bill, adopted that contract, and are therefore liable to pay the difference to the plaintiffs."

(b) The points marked for argument on the part of the defendants were as follows:—

"1. That, upon the facts stated, it does not appear that the defendants are liable to pay to the plaintiffs the sum sought to be recovered, or any part of it:

"2. That the plaintiffs were bound to pay their acceptance for 600*l.* at maturity, whether in the hands of the bankrupt's assignees or endorsees for value, and that nothing has subsequently occurred to make the defendants liable to refund that which they were at the time entitled to receive:

"3. That, if the plaintiffs were not liable to pay the whole amount of the bill at maturity to the defendants, their exemption from such liability must arise from a right of set-off or mutual credit, and that, by not availing themselves of it at the time, the plaintiffs have lost that remedy, and must prove against the bankrupt's estate:

"4. That, if the true nature of the contract between the bankrupt and the plaintiffs was, that the bankrupt should indemnify the plaintiffs against the consequence of accepting the bill of exchange in the event of the proceeds of the sale of the goods proving insufficient, the plain-

\*522] \*ERLE, C. J.—I am of opinion that the defendants are entitled to judgment. The plaintiffs gave Morton, the bankrupt, their acceptance for 600*l.* upon the faith of a consignment made through them to their correspondents abroad, with an understanding that this advance was to be repaid out of the proceeds of the goods consigned, any deficiency to be made good by Morton. The plaintiffs paid their acceptance at maturity. Suppose an action had been brought against them by the assignees to recover the amount of the bill, is there any plea which the now plaintiffs could have pleaded in bar of the assignees' claim against them on the bill? It seems to me that there is not. It follows, therefore, that the assignees had a right to receive the fund, and that the plaintiffs have no right to recover back any portion of it in this action.

The rest of the Court concurring,

Judgment for the defendants.

tiffs would have no right of action against the defendants, but the bankrupt still remains liable to the plaintiffs upon such contract of indemnity:

"5. That, in no case can the action be maintained against the official assignee, the bill having been paid into the Bank of England to the credit of the accountant in bankruptcy, for the estate of the bankrupt."

\*523]

\*KEMP v. NEVILLE. June 12.

A judicial officer is not liable to be sued for an adjudication according to the best of his judgment upon a matter within his jurisdiction: and a matter of fact so adjudicated by him cannot be put in issue in an action against him.

To an action against the vice-chancellor of the university of Cambridge for assaulting the plaintiff, a young female, and imprisoning her in a place called the Spinning House, and compelling her to take off her clothes and put on a prison dress,—the defendant pleaded, that, the proctors of the university, acting under the authority of the charter of the university (confirmed by Act of Parliament), having, upon a certain scrutiny, search, and inquiry in the town and suburbs of Cambridge, found the plaintiff and divers other women assembled together in a certain carriage in company with certain scholars of the university, in a certain public street in the said town, and then reasonably suspecting the plaintiff of evil, that is to say, of being in company with the said scholars for idle, disorderly, and immoral purposes, had as officers of the university, and by command of the chancellor, &c., arrested and apprehended the plaintiff, and brought her before the defendant, then being the vice-chancellor of the university, in order for her examination touching and concerning the premises: whereupon the defendant did then and there examine the plaintiff, and was thereupon satisfied of the matters aforesaid, and that the plaintiff had so been in company with the said scholars for idle, disorderly, and immoral purposes, wherefore the defendant caused the plaintiff to be punished by the imprisonment of her body for a reasonable time in that behalf, to wit, &c., in the place in the declaration mentioned, being a fit and proper and convenient place in that behalf; and that the compelling the plaintiff to take off her clothes, &c., was part of the reasonable discipline of the said place of confinement then usual, &c.

By the charter, which was put in, the chancellor, &c., of the university were empowered "*per seipsos, aut per eorum deputatos, officarios, servientes, et ministros, seu per eorum aliquem sive aliquos, de tempore in tempus ad omnia tempora, tam in die quam in nocte, ad eorum beneplacitum, ex nunc in perpetuum, ad faciendum scrutinium, scrutationem, et inquisitionem, tam per diem quam per noctem, quotiescunq. et quandocunq. eis videbitur, expedire in prædictâ villâ Canteburgiæ, et in suburbis ejusdem, &c., de et pro omnibus et publicis mulieribus, prœnubis, vagabondis, et aliis personis de malo suspectis, ad dictam villam et suburbia, ferias, mercatus, nundinas et loca prædicta, seu ad eorum aliquem venientes seu confluentes; ac omnes et singulas illas personas quas iidem cancellariis, magistri, et scholares, aut eorum successores, aut eorum deputati, officarii, servientes, et ministri, seu eorum aliqui seu aliquis, super aliquod hujusmodi scrutinium, scrutationem, sive inquisitionem, reas seu suspectas de malo, invenerint puniendi per imprisonamenta corporum suorum, bannitionem, et aliter, prout*

cancellario dictæ universitatis Canteburgiæ, aut ejus vicemgerenti pro tempore existenti videbitur punire," &c.

The plaintiff and several other young women, residents of Cambridge, being found by certain proctors of the university in an omnibus, in the town, in company with certain undergraduates proceeding to a dance at a village a short distance from Cambridge, took the females to the Spinning-House, the usual place of confinement of the university. The plaintiff was there taken before the defendant (the vice-chancellor), who questioned her as to her residence and occupation, and as to who invited her to the party, &c., and ultimately,—without hearing any evidence upon oath, or making any inquiry about the plaintiff of certain persons to whom she wished to refer, and without any warrant in writing,—committed her to the Spinning-House for fourteen days, where she was deprived of her clothes, and forced to wear the prison dress. It was admitted that the defendant, throughout the proceeding complained of, acted *bonâ fide* and according to the best of his judgment and discretion.

Upon these facts, the following questions were submitted to the jury,—first, whether the proctors and the vice-chancellor had reasonable cause of suspicion that the plaintiff was in company with the undergraduates for idle, disorderly, and immoral purposes,—secondly, whether the vice-chancellor duly heard and examined the plaintiff,—thirdly, whether the place of imprisonment and the treatment of the plaintiff therein were proper and reasonable.

The jury found that *the proctors* had reasonable cause for suspicion; that the defendant had not made due inquiry into the plaintiff's character, and that the punishment was undeserved; but that the complaint of the prison and the treatment therein was unfounded:—

Held, that, upon this finding, the defendant was entitled to the verdict; for, that, as the charter in express terms invested the vice-chancellor with authority to punish by imprisonment or otherwise as he should think fit, he thereby became invested with judicial authority, and a Judge of a Court of record, and entitled to all the protection attached by law to the judicial office.

Held also, that the jurisdiction to hear and determine and pass sentence of imprisonment attached when the proctors, being officers of the university, brought before the vice-chancellor for adjudication a person found by them in Cambridge, and apprehended by them as being a person suspected of evil, within the meaning of the charter; and that, as the charter defined no form of proceeding, either for the hearing, or the determination, or the committal, an action of trespass could not be sustained for any of the judicial acts complained of.

Held also, that, there being no express provision in the charter on the subject, the vice-chancellor was not bound to hear and examine upon oath; and that the absence of a written warrant for the commitment of the plaintiff afforded no cause of action.

THE declaration in this case charged that the defendant caused an assault to be made on the plaintiff, and caused her to be unlawfully imprisoned and kept and detained in prison in a certain gaol or place of \*confinement commonly called and known by the name of the [ \*524 Spinning-House, for a long space of time; and also caused the plaintiff to be forced and compelled to take from her person the clothes which she was then wearing, and caused her said clothes to be taken away from her, and caused her to be deprived of the use and enjoyment thereof for a long space of time, and caused her to be forced and compelled to put on certain other clothes of an inferior quality and description, and to wear the same during the aforesaid long space of time, and caused the plaintiff to be in the said gaol or place of confinement forced and compelled to work and labour for divers long spaces of time whilst the plaintiff was imprisoned in the said gaol or place of confinement as aforesaid; whereby the plaintiff was greatly bruised, wounded, and hurt, and was greatly injured and damnified in her reputation and character, and was otherwise greatly injured; and other wrongs to the plaintiff the defendant did: claim 500*l*.

The defendant pleaded,—first, not guilty.

Secondly, that the chancellor and scholars of the university of Cambridge, from time whereof the memory of man is not to the contrary until the time of \*making a certain Act of Parliament made and [ \*525 passed in the 13th year of the reign of Queen Elizabeth (13

Eliz. c. 29), intituled "An Act concerning the several incorporations of the universities of Oxford and Cambridge and the confirmation of the charters, liberties, and privileges granted to either of them," were a body corporate by various names of incorporation, amongst others, by the name of The Chancellor, Masters, and Scholars of the University of Cambridge, and by that name had succession, and that by the said Act it was enacted that the then chancellor of the said university and his successors for ever and the masters and scholars of the same university for the time being should be incorporated and have perpetual succession by the name of The Chancellor, Masters, and Scholars of the University of Cambridge; that the office of proctors of the said university, is, and from time whereof the memory of man is not to the contrary was, an ancient office, and that the persons for the time being duly holding such office have, and each of them hath, during all the time aforesaid, by custom of and in the said university from time whereof the memory of man is not to the contrary there used and approved, for the preservation of good order and morality amongst the scholars of the said university, visited, and been used and accustomed and of right ought to visit, all and every the public streets and places in the town of Cambridge, and within the precincts of the said university, at all times of the day and night, and have and each of them hath been used and accustomed, and of right ought, to arrest and apprehend all such women as in such their visits they or either of them have or hath found within the limits and precincts aforesaid, who, upon reasonable grounds, have been suspected by the said proctors or either of them to be loose or disorderly women, or who within the limits and precincts \*526] \*aforesaid have been found keeping company with any of the scholars aforesaid in such manner and under such circumstances as upon reasonable grounds to be by the said proctors or either of them suspected of evil, and to take such persons so arrested and apprehended before the vice-chancellor of the said university for the time being, to be dealt with according to law: That the office of vice-chancellor is, and from time whereof the memory of man is not to the contrary was, an ancient office of the said university; and that, before and at the time of committing the alleged grievances in the declaration mentioned, the defendant was the vice-chancellor of the said university; and that, from time whereof the memory of man is not to the contrary until the passing of the said Act, upon any such women having been so arrested and apprehended and taken before the vice-chancellor of the said university for the time being as aforesaid, the said vice-chancellor for the time being has by custom of and in the said university from time whereof the memory of man is not to the contrary there used and approved, heard and examined all such women so apprehended and arrested as aforesaid, and, upon being satisfied that such women have then been proved to be loose or disorderly women, or have been found within the limits and precincts aforesaid keeping company with any of the scholars aforesaid, in such manner and under such circumstances as aforesaid, have, whenever to them hath seemed meet, caused such women to be punished by imprisonment of their bodies for such reasonable time, and in such convenient prison, and subject to such usual and reasonable discipline, as to the said vice-chancellor for the time being hath seemed meet: That, before and at the time of the alleged grievances, and after the passing

of the said Act and of the Cambridge Award Act, \*1856 (19 & 20 Vict. c. xvii.), one Thomas Samuel Woollaston lawfully held [\*527 and exercised the said office of proctor of the said university, being the office mentioned in the said last-mentioned Act: That the said Thomas Samuel Woollaston, being such proctor as aforesaid, shortly before the committing of the alleged grievances, found the plaintiff within the limits and precincts aforesaid, in one of such his visits as aforesaid; and that the plaintiff then and until after the committing of the alleged grievances was a woman who upon reasonable grounds was suspected by the said Thomas Samuel Woollaston to be a loose and disorderly woman, and who then was found within the limits and precincts aforesaid, keeping company with divers scholars of the said university in such manner and under such circumstances as that she the plaintiff then and until after the committing of the alleged grievances was on reasonable grounds by the said Thomas Samuel Woollaston suspected of evil: Whereupon the said Thomas Samuel Woollaston, so being such proctor as aforesaid, before the committing of the alleged grievances, had arrested and apprehended the plaintiff in order to take her and had then taken her before the defendant, so being such vice-chancellor as aforesaid, to be dealt with according to law; and thereupon the defendant, so being such vice-chancellor as aforesaid, did then and there hear and examine the plaintiff, and was thereupon satisfied that the plaintiff then was a loose and disorderly woman, and then had been found by the said Thomas Samuel Woollaston, so being such proctor as aforesaid, within the limits and precincts aforesaid, keeping company with divers scholars of the said university, for idle, disorderly, and immoral purposes, and did then cause the plaintiff to be punished by imprisonment of her body for a reasonable time in that behalf, to wit, for five days, in the place of \*confinement in the declaration mentioned, being a fit and convenient place in that behalf: And that the compelling the plaintiff [\*528 to take off the clothes as in the declaration mentioned, and compelling her to put on the said other clothes, and to wear the same, and to work and labour, as in the declaration mentioned, then were and each of them was a part of the reasonable discipline of the said place of confinement then used and approved of by the defendant, so being such vice-chancellor as aforesaid; which were the several grievances in the declaration alleged.

Thirdly,—that the chancellor, masters, and scholars of the university of Cambridge, at the time of the granting of the letters patent thereafter in part set forth, were a body politic, and had succession as in the introductory part of the second plea mentioned, and that Elizabeth then Queen of England, &c., on the 26th day of April in the third year of her reign, by Her Majesty's letters patent sealed with the great seal of England, bearing date the same day and year, did, for herself, her heirs and successors, grant to the then chancellor, masters, and scholars of the said university and their successors, that it should be lawful for the aforesaid chancellor, masters, and scholars, and their successors, by themselves or by their deputies, officers, servants, and ministers, or by any one or more of them, from time to time and at all times, as well by day as by night, at their good pleasure, from thenceforth to make scrutiny, search, and inquiry as well by night as by day, as often and whensoever it should seem to them expedient, in the aforesaid town of Cam-

bridge, and in the suburbs of the same, and other places in the said letters patent mentioned, of and for all common women, vagabonds, and other persons suspected of evil coming to or assembling at the aforesaid \*529] town and suburbs, and other \*places, or any of them, and all and every the persons which the same chancellor, masters, and scholars, or their successors, or their deputies, officers, servants, and ministers, or any one or more of them, upon any such scrutiny, search, or inquiry, should find guilty or suspected of evil, to punish by imprisonment of their bodies, banishment, and otherwise, as to the chancellor of the said university or his vice-chancellor for the time being should seem fit, without impeachment, molestation, disturbance, or grievance of Her the said Queen Elizabeth, her heirs or successors, or any of them, any statute notwithstanding; and which letters patent the said then chancellor, masters, and scholars duly accepted: That, by a certain Act of Parliament passed in the 13th year of the said Queen's reign, being the Act in the second plea mentioned, it was enacted as in that plea mentioned; and it was in and by the same Act, amongst other things, further enacted that the letters patent as aforesaid should from thenceforth be good, effectual, and available in the law to all intents, constructions, and purposes, to the aforesaid then chancellor, masters, and scholars, and to their successors for ever, as amply, fully, and largely as if the same letters patent had been repeated verbatim in the said Act: That, before the committing of the alleged grievances, Thomas Samuel Woollaston and Edward William Blore, then being officers and servants of the said chancellor, masters, and scholars, and by their command, having, upon a certain such scrutiny, search, and inquiry in the aforesaid town and suburbs of Cambridge, found the plaintiff and divers other women assembled together in a certain carriage in company with certain scholars of the said university, in a certain public street in the said town, and then reasonably suspecting the said plaintiff of evil, that is to say, of being in company with the said scholars for idle, \*530] \*disorderly, and immoral purposes, had, as such officers and servants, and by such command, arrested and apprehended the plaintiff, and brought her before the defendant, then being the vice-chancellor of the said university, in order for her examination touching and concerning the premises, the said defendant then being the proper officer and deputy of the said chancellor, masters, and scholars in that behalf: Whereupon the defendant, so being such vice-chancellor as aforesaid, did then and there hear and examine the plaintiff, and was thereupon satisfied of the matters aforesaid, and that the plaintiff had so been in company with the said scholars for idle, disorderly, and immoral purposes; wherefore the defendant did then cause the plaintiff to be punished by the imprisonment of her body for a reasonable time in that behalf, to wit, for five days, in the place of confinement in the declaration mentioned, being a fit and proper and convenient place in that behalf: And that the compelling the plaintiff to take off her clothes she was then wearing, as in the declaration mentioned, and to put on and wear the other clothes in the declaration also mentioned, and the taking away of the said first-mentioned clothes as alleged, and the compelling the plaintiff to work and labour as alleged, then were and each of them was a part of the reasonable discipline of the said place of confinement then used and approved of by the defendant, so being such

vice-chancellor as aforesaid; which were the several grievances in the declaration mentioned.

The plaintiff joined issue on the first plea. To the second plea she replied as follows:—The plaintiff, as to the defendant's second plea, admits the statutes in that plea mentioned, and that it was enacted by the statute therein first mentioned as in that plea alleged; and for replication to the said second plea the plaintiff takes issue upon the residue thereof. There was a similar replication to the third plea.

\*The cause was tried before Erle, C. J., at the sittings at Westminster after last Hilary Term, when the facts which appeared [\*531 - in evidence were in substance as follows:—The plaintiff was a milliner and dress-maker residing with her mother, who was a widow, in Dover Street, Cambridge, and, so far as appeared, was a person of irreproachable character. The defendant, the Hon. and Rev. Latimer Neville, is master of Magdalene College, Cambridge, and at the time when the transactions in question took place was vice-chancellor of the university, and also *virtute officii* a magistrate for the borough of Cambridge.

In the latter part of January, 1860, the plaintiff with several other young women also resident in Cambridge were invited to an evening party which was proposed to be given by some young gentlemen, members of the university, at the De Freville Arms, a respectable house of entertainment at the village of Great Shelford, about four miles from Cambridge, for the purpose of celebrating the accession of one of the party to his degree of B. A. An omnibus was hired for the conveyance of the party, with a small band of music, and to bring them back. Information of what was going on having by some means reached the Rev. Edward William Blore, one of the pro-proctors of the university, that gentleman consulted the senior proctor, the Rev. Thomas Samuel Woollaston, and they with their assistants proceeded to Parker's Piece, along which the omnibus was expected to pass, and, on seeing it approach, they caused the driver to stop, and one of them, opening the door, asked if any members of the university were there. Two of the party thereupon got out of the omnibus and gave their names and colleges. The omnibus was then conducted with the rest of the party to the Spinning-House, a building situate in St. Andrew's Street, Cambridge, which has for many \*years past been used by the uni- [\*532 versity as a place for confining persons apprehended by the proctors and sentenced to imprisonment by the vice-chancellor for street-walking within his jurisdiction. Arrived at the Spinning-House, the plaintiff and her companions were removed from the omnibus and taken into a room adjoining the entrance hall, in which were the two proctors, Woollaston and Blore, who asked the plaintiff her name, address, and occupation, which she gave. The plaintiff was then placed by the matron in a separate cell; and, after being detained there for about half an hour, she was taken back to the room first mentioned, where she found the defendant seated at a table with Messrs. Woollaston and Blore and two other proctors. The defendant then proceeded to examine her, and, having first asked her name, address, and occupation, asked her where she was going when stopped by the proctors. She answered that she was going to a private party at Shelford. The defendant then asked her if she was aware that the gentlemen in the omnibus were members of the university, and what sort of a party it was to

have been; to which she replied that she knew that one of the gentlemen was a member, and that she considered the party was to be a respectable one. She was then asked if she was aware that breakfast had been ordered for the next morning; to which she answered in the negative, adding that she was told she would be home by 12 o'clock that night. The defendant then asked her by whom she was invited. She named one of the gentlemen who had been in the omnibus. The plaintiff then asked the defendant if he would allow her to refer for her character to certain ladies in the town for whom she worked. Her request, however, was unheeded; and the defendant sentenced her to be \*533] imprisoned in the Spinning-House for fourteen days, \*saying that he considered her case worse than that of the others, inasmuch as she had taken her younger sister (a girl about fourteen) with her.

Of the rest of the party, two were set at liberty, one was sentenced to a week's imprisonment, one to four days, and two to three days each.

The gentleman by whom the party at Shelford was given was also called as a witness, and he wholly disclaimed all intention of impropriety.

The place of confinement was described by the plaintiff and her witnesses to be cold and damp. The plaintiff's clothes were taken from her by the matron, and a prison dress substituted for them. She was not, however, detained longer than the fifth day, when, in consequence of representations made to the defendant by some persons to whom she and her mother were known, she, as well as the rest of the prisoners, was discharged.

The plaintiff further proved that there was no examination of any witnesses upon oath in her presence; nor was she aware of any warrant of commitment having been drawn up. There was in fact no regular warrant prepared at the time; but, on the trial, the counsel for the defendant stated that there was a warrant, but that it was informal, and that a more formal one had been prepared, and would be put in. (a)

\*534] \*The defence was based upon the charter granted to the university by Queen Elizabeth in the third year of her reign, and confirmed by the statute of 13 Eliz. c. 29, the 8th section of which charter was as follows:—"Et insuper volumus, et pro nobis, hæredibus et successoribus nostris, per præsentem concedimus præfatis cancellario, magistris, et scholaribus, et successoribus suis, in perpetuum, quod bene

(a) This warrant of commitment, which had been prepared by counsel long after the commencement of the action, was as follows:—

"To the keeper of the Spinning-House or House of Correction in the town of Cambridge.

"Whereas Emma Kemp hath been apprehended by the Rev. Thomas Samuel Woollaston, one of the proctors of the said university, within the limits and jurisdiction thereof, and hath been this day brought before me and charged with being in company with divers scholars of the said university. for idle, disorderly, and immoral purposes, in a certain public street of the town and suburbs of Cambridge, and within the precincts of the said university; which charge, as well upon the information of the said proctor, as upon the examination of the said culprit, and after having heard what the said culprit had to allege in her defence, I did adjudge to be true: These are, therefore, to require and command you to receive into your custody the said culprit, and her safely to keep in your said Spinning-House for fourteen days. Given under my hand and seal the 30th day of January, 1860.

"LATIMER NEVILLE, Master of Magdalene College,  
and Vice-Chancellor of the University of Cambridge."

hæbit præfatis cancellario, magistris, et scholaribus, et successoribus suis, per seipsos, aut per eorum deputatos, officarios, servientes, et ministros, seu per eorum aliquem sive aliquos, de tempore in tempus ad omnia tempora, tam in die quam in nocte, ad eorum beneplacitum, ex nunc in perpetuum, ad faciendum scrutinium, scrutationem, et inquisitionem, tam per diem quam per noctem, quotiescunq. et quodocunq. eis videbitur expedire in prædictâ villâ Canteburgiæ, et in suburbis ejusdem, et in Barnewell et Sturbridge prædictus, *de et pro omnibus et publicis mulieribus, pronubis, vagabondis, et aliis personis de malo suspectis, ad dictam villam et suburbia, ferias, mercatus, nundinas, et loca prædicta, seu ad eorum aliquem venientes seu confluentes*; ac omnes et singulas illas personas quas iidem cancellarius, magistri, et scholares, aut eorum successores, aut eorum deputati, officarii, servientes, et ministri, seu \*eorum aliqui seu aliquis, super aliquod hujusmodi [\*535 scrutinium, scrutationem, sive inquisitionem, *reas seu suspectas* *de malo* invenerint, puniendi per imprisonment corporum suorum, bannitionem, et aliter, prout cancellario dicta universitatis Canteburgiæ, aut ejus vicemgerenti pro tempore existenti, videbitur punire, absq. impetitione, molestatione, perturbatione, seu gravamine nostri hæredum vel successorum nostrorum, aut aliquorum officiariorum seu ministrorum, vel alicujus officarii seu ministri nostris hæredum vel successorum nostrorum seu eorum alicujus, statuto sive acta parlamenti jam edito seu in posterum edendo in aliquo non obstante," &c., &c.

The defendant and the Rev. Mr. Blore were examined: and the latter justified his suspicion of the intention of the parties by the circumstances under which they were found and apprehended, and the antecedents of some of the young women.

It was also proved that the Spinning-House was the usual place of imprisonment of the university, and was subject to the regulation of the secretary of state, and visitation of the government inspector.

The contention on the part of the plaintiff at the trial was, that the charter did not justify the arrest and incarceration of the plaintiff, there being nothing to show that she was a person of loose or immoral character, or that she had been guilty of any offence punishable by law; that the proceeding before the vice-chancellor, no witnesses being called to prove the charge alleged against the plaintiff, and no opportunity being offered to her to defend herself, was oppressive and illegal; and that her commitment without warrant was a gross and unconstitutional violation of the law. It was further contended that the Spinning-House was not a fit and proper gaol for the vice-chancellor to commit to; and that the depriving the plaintiff of her \*clothes, and substituting [\*536 the prison garb, was an unreasonable and improper violation of the liberty of the subject. It was, however, admitted by the plaintiff's counsel, that the vice-chancellor had throughout the proceedings complained of acted bonâ fide and according to the best of his judgment and discretion.

On the part of the defendant, it was submitted, that, assuming the evidence given on the part of the plaintiff to be true, it sustained all the material allegations in the defendant's pleas; and that the vice-chancellor, having acted throughout in the capacity of Judge of a Court of record, and having as such adjudicated to the best of his judgment upon a matter within his jurisdiction brought before him for judicial determi-

nation, no action could be maintained against him in respect of anything so done by him, however mistaken he might have been either in respect of fact or of law.

The learned Judge, reserving leave to the defendant to move to enter a verdict for him upon this ground, left the case to the jury, elaborately reviewing the facts and the arguments urged on the one side and on the other, and laying down the law substantially as follows:—

Before I proceed to consider the questions of law which are raised by the record, and upon which your verdict will depend, I will draw your attention to that which was last alluded to by the counsel for the plaintiff, viz., whether the vice-chancellor could lawfully commit the plaintiff without a warrant; and whether the Spinning-House was a fit and convenient place for him to commit to, and whether the change of the plaintiff's clothes to the prison dress was reasonable discipline. As to the committing without a warrant, it is my duty to tell you that no warrant at all was necessary, but that the vice-chancellor had authority \*537] to hear the parties, and to make the committal by word \*of mouth. As to whether the gaol was a fit and proper place, and the change of clothes a reasonable discipline, I shall leave you to say: but still I should submit to your consideration, that, if the authorities at Cambridge have the right to commit, and the place in question has been a known prison of the university as far back as memory can go, and that prison is regulated by the secretary of state and under the surveillance of the government inspector, it would be a very strong thing to say that the vice-chancellor of the university can be made liable in trespass for committing a party to a gaol so regulated and so inspected. Whatever may be the result of your opinion upon the two main points, I will ask you to say what damages you think the plaintiff entitled to in case the vice-chancellor has not power to commit without a warrant: and, in that case, I will reserve leave to the plaintiff to move to enter the verdict for her for such damages as you may contingently assess.

I now proceed to address myself to the main points for your consideration. The plaintiff complains that she was unlawfully imprisoned by the defendant. The defendant, for his justification, relies upon the charter of Queen Elizabeth, which, being confirmed by Act of Parliament, is as much the law of the land as any other law,—that is, for the local government of Cambridge. Now, by the words of that charter or law, it is provided, amongst other things, that “it shall be lawful for the vice-chancellor and his successors, by themselves and by their deputies and servants, from time to time, as well by night as by day, at their pleasure, to make scrutiny, search, and inquiry in the town of Cambridge, and in the suburbs, *for all common women, vagabonds, and other persons suspected of evil*, coming into the town:” and then the charter goes on \*538] to say that all persons who upon such search shall be \*found guilty or suspected of evil, they may imprison by their bodies as they shall think fit. The reason of the law it is only material to consider in so far as it bears upon its interpretation. Considering the age and condition of the persons who are assembled at the university, it is obvious that somewhat stringent regulations were necessary to protect and control their intercourse with the rest of the world while intrusted to its care,—and especially to guard them against that species of attraction to which the words of the charter I have adverted to more

particularly point: and this may well account for the very wide expressions used, not confining it to common women and vagabonds," but extending the power given to the vice-chancellor and his officers to "persons suspected of evil." I need not, however, commit myself to an exact exposition of the law contained in this charter, because the legal advisers of the defendant have expressly stated in the pleas which have been put upon the record the construction of it upon which they rely. The allegation in the third and more material plea, is, that the proctors, "being officers and servants of the said chancellor, masters, and scholars, and by their command, having, upon a certain scrutiny, search, and inquiry in the aforesaid town and suburbs of Cambridge, found the plaintiff and divers other women assembled together in a certain carriage, in company with certain scholars of the said university, in a certain public street in the said town, and then reasonably suspecting the plaintiff of evil, that is to say, *of so being in company with the said scholars for idle, disorderly, and immoral purposes*, had, as such officers and servants, and by such command, arrested and apprehended the plaintiff, and brought her before the defendant, then being the vice-chancellor of the said university, in order for her examination touching and concerning the premises," &c.

\*[His Lordship then proceeded to observe upon the evidence [\*539 to support that plea, remarking that all the material allegations therein were established by the statement of the plaintiff herself, except that which related to the plaintiff's being found in company with the scholars for idle, disorderly, and immoral purposes, and so being reasonably suspected of evil: and he told them, that, in order to sustain the plea, it was not necessary that there should have been a preconcerted intention on the part of all or any of the parties concerned to commit any immorality; but that it was enough if the circumstances in which they were found were such as fairly to lead to the belief on the part of the proctors that immorality was likely to result therefrom.]

A great deal has been said by the counsel for the plaintiff about the vice-chancellor not having heard or examined anybody on oath. For the purpose of to-day, I lay it down to you as law that the vice-chancellor was not bound to administer an oath, and that the information of the proctors and the examination of the plaintiff herself was a sufficient hearing and examination to warrant him in committing her to prison as he did.

His Lordship concluded by leaving three questions to the jury,—first, whether the proctors and the vice-chancellor had reasonable cause of suspicion that the plaintiff was in company with the undergraduates for idle, disorderly, and immoral purposes,—secondly, whether the vice-chancellor duly heard and examined the plaintiff,—thirdly, whether the place of imprisonment and treatment of the plaintiff therein were proper and reasonable.

The jury, after considerable hesitation, and after a long discussion had taken place between them and the Court and the respective counsel, found that *the \*proctors* had reasonable cause for suspicion; and, [\*540 in respect of the hearing and examination of the plaintiff, that the defendant had not made due inquiry into her character, and that the punishment was undeserved: but that the complaint of the prison and the treatment therein was unfounded.

After some further discussion as to the effect of this finding of the jury, his Lordship directed a verdict to be entered for the plaintiff, at the same time intimating an opinion that it was an imperfect verdict. The jury assessed the damages at 40s.

*Edwin James*, Q. C., in Easter Term last, moved, on behalf of the plaintiff, for a new trial on the ground of misdirection on the part of the learned Judge in telling the jury that a warrant in writing for the commitment of the plaintiff was not necessary (*Ex parte Gray*, 2 D. & L. 539); and also in the construction put upon the charter (as to which he submitted that "persons suspected of evil" did not mean "persons who had placed themselves in such a position that their acts might result in evil," but "persons whose previous conduct and character rendered them objects of reasonable suspicion," which was not pretended to be the case with the present plaintiff); and in omitting to tell the jury that there was no legal hearing and examination of the plaintiff by the defendant before her commitment (as to which he submitted that every hearing must be conducted according to known legal principles, the witnesses in support of a charge being examined in the presence of the accused,—a right recognised by the 2d section of the Prisoners' Counsel Act, 6 & 7 W. 4, c. 114, and the case of *The King v. Crowther*, 1 T. R. 125); and also in omitting to tell the jury that the gaol in question was a private gaol, and that the defendant had no right to commit \*541] the \*plaintiff thereto. He also moved for a new trial on the ground of the inadequacy of the damages.

The Court suspended its decision upon this motion until the defendant should have moved to enter the verdict for him pursuant to the leave reserved to him at the trial,—as to which, vide *antè*, p. 536.

*Sir Fitzroy Kelly*, Q. C., on a subsequent day, moved on the part of the defendant, for a rule to show cause why the verdict should not be entered for him upon the above finding. He submitted that the imprisonment complained of was a judicial act by the defendant, a Judge of a Court of record, acting *bonâ fide* in a matter in which he had jurisdiction, and therefore not the subject of an action, even though he erred in point of fact or of law, or had been wanting in prudence or discretion: and he referred to *Groenvelt v. Burwell*, 1 Salk. 200, 396, 3 Salk. 354, 12 Mod. 386, Holt 184, 395 (E. C. L. R. vol. 3), Comb. 76, 1 Lord Raym. 213, 454, Carth. 491, *Hamond v. Howell*, 1 Mod. 184, 2 Mod. 218, *Garnett v. Ferrand*, 6 B. & C. 611 (E. C. L. R. vol. 13), 9 D. & R. 657 (E. C. L. R. vol. 16), and *Ex parte Death*, 18 Q. B. 647 (E. C. L. R. vol. 83).

ERLE, C. J., suggested that a rule nisi should be granted upon the points urged by *Sir F. Kelly*, and that, upon the discussion of that rule, the plaintiff should be at liberty to urge the several points upon which she relied,—saving as to the amount of damages. The rule was ultimately drawn up as follows:—

"It is ordered that the plaintiff, upon notice of this rule to be given to her or her attorney, shall show cause to this Court, on, &c., why the verdict found on the trial of this cause at, &c., should not be set aside, and instead thereof a verdict be entered for the defendant, pursuant to \*542] leave reserved, on the grounds,—\*first, that the defendant acted as a Judge, and is not liable to an action,—secondly, that the finding of the jury, except where in favour of the defendant, is imma-

terial: the said plaintiff being at liberty, on such cause being shown as aforesaid, to raise any points contended for by the plaintiff on the motion already made to the Court on behalf of the said plaintiff,—each of the said parties being at liberty to appeal on all questions fit for the Court of error: And it is further ordered, that, at the time of such cause being shown as aforesaid, the said plaintiff shall be at liberty to insist,—first, that the Judge presiding at the said trial misdirected the jury in holding that a warrant in writing was not necessary,—secondly, that the said Judge put a wrong construction upon the charter,—thirdly, that he ought to have told the jury that there was no legal hearing or examination by the vice-chancellor,—fourthly, that he ought to have told the jury that the prison in question was a private gaol, and that the vice-chancellor had no right to commit to it: the said plaintiff to be in the same position as to setting aside the said verdict found in this cause, or appealing to the Court of error, as though a separate rule had been granted by the Court to the said plaintiff on the grounds above mentioned.”

*Lush*, Q. C., *Welsby*, and *Couch*, in Easter Term last, showed cause.—They submitted, that the legal effect of the finding of the jury was, a negation of the material part of the third plea, to sustain which it was essential for the defendant to show that he had duly heard and examined and was satisfied of the guilt of the accused (*The King v. Simpson*, 1 Stra. 45, *Capel v. Child*, 2 C. & J. 558,† per Lord Tenterden in *Basten v. Carew*, 3 B. & C. 649, 652 (E. C. L. R. vol. 10), 5 D. & R. 558 (E. C. L. R. vol. 16)): that there cannot legally be an imprisonment without a record or a \*conviction and a warrant (*Paley on Convictions* 215, 388, 1 Hale’s P. C. 583, *The King v. Beck*, 1 Stra. 127, [\*543 per Yates, J., in *Strickland v. Ward*, 7 T. R. 631 n., 633 n., *Ex parte Bassett*, 6 Q. B. 481 (E. C. L. R. vol. 51), 1 New Sess. Cas. 337, *In re Nesbett*, 1 New Sess. Cas. 366, *Prickett v. Gratrex*, 8 Q. B. 1021 (E. C. L. R. vol. 55), 2 New Sess. Cas. 429), which warrant must exist at the time, and cannot be drawn up afterwards (*Mostyn v. Fabrigas*, 1 Cowp. 161, *Hutchinson v. Lowndes*, 4 B. & Ad. 118 (E. C. L. R. vol. 24)), though a conviction may: that the charter granted by Queen Elizabeth to the university, or the statute which confirmed it, did not invest the vice-chancellor with the authority of a Judge of a Court of record, nor was the plea framed on that supposition: that, though ordinarily none but a Court of record can punish by fine and imprisonment (*Dr. Bonham’s Case*, 4 Co. Rep. 355, *Beecher’s Case*, 8 Co. Rep. 260), yet the mere power to fine and imprison does not per se constitute a Court of record: and that the Spinning-House was not a legal place of imprisonment,—Bacon’s Abridgment, *Gaol and Gaolers* (A.); and see the 23 H. 8, c. 3, and 5 & 6 W. 4, c. 38.(a)

*Sir Fitzroy Kelly*, Q. C., *O’Malley*, Q. C., and *Denman*, Q. C., in support of the rule, contended in substance as follows:—That the defendant was entitled to a verdict upon the evidence as it stood at the close of the plaintiff’s case; that the vice-chancellor acted as a Judge of a Court of record, though with a limited jurisdiction, and was pro-

(a) There was a second action arising out of the same transaction, *Erett v. Neville*, which it was arranged should abide the event of *Kemp v. Neville*. Upon the argument of the rule in this case, *Naylor* (with whom was *Hawkins*, Q. C.) was heard on behalf of the plaintiff in that case.

tected in all he did; and that the objections urged on the part of the plaintiff, whether in an action for false imprisonment, or on a motion for \*a writ of habeas corpus to discharge the plaintiff from custody, \*544] were equally void of foundation,—citing *Gwinne v. Poole*, 2 Lutw. 935, 1560, *Groenvelt v. Burwell*, 1 Salk. 200, Comb. 76, 1 Lord Raym. 454, Carth. 421, 491, *Godfrey's Case*, 11 Co. Rep. 42, *The Case of Conspiracy (Floyd v. Barker)*, 12 Co. Rep. 24, *Bushell's Case*, 1 Mod. 119, *Hamond v. Howell*, 1 Mod. 184, 2 Mod. 218, *Mostyn v. Fabrigas*, 1 Cowp. 161, *Calder v. Halkett*, 3 Moore's P. C. 28, *Taaffe v. Lord Downes*, 3 Moore's P. C. 36, n., *Doswell v. Impey*, 1 B. & C. 163 (E. C. L. R. vol. 8), 2 D. & R. 350 (E. C. L. R. vol. 16), *Dicas v. Lord Brougham*, 6 C. & P. 249 (E. C. L. R. vol. 25), *Case of the Marshalsea*, 10 Co. Rep. 64, *Houlden v. Smith*, 14 Q. B. 841 (E. C. L. R. vol. 68), *Garnett v. Ferrand*, 6 B. & C. 611 (E. C. L. R. vol. 13), 9 D. & R. 657 (E. C. L. R. vol. 22), *Tozer v. Child*, 7 Ellis & B. 377 (E. C. L. R. vol. 90), *Cave v. Mountain*, 1 M. & G. 257 (E. C. L. R. vol. 39), 1 Scott N. R. 132, *Hutchinson v. Lowndes*, 4 B. & Ad. 118 (E. C. L. R. vol. 24), *Ackerley v. Parkinson*, 3 M. & Selw. 411, *The King v. Barker*, 1 East 185, *Massey v. Johnson*, 12 East 67, 82, *Gray v. Cookson*, 16 East 13, *Brittain v. Kinnaird*, 1 Brod. & B. 433 (E. C. L. R. vol. 5), 4 J. B. Moore 50 (E. C. L. R. vol. 16), Hawk. P. C., Book 2, c. 16, ss. 3, 12, 3 Bl. Com. 24, 25: That the finding that the vice-chancellor did not make due inquiry as to the plaintiff's character of the persons to whom she referred, was altogether idle and immaterial; for that, assuming he was wrong in this respect, it would amount to nothing more than an improper rejection of evidence, which never could be suggested to form a ground of action against the Judge: That, as to the warrant, if necessary, the existence of a valid warrant at the time would be presumed, and that, at all events, the formal warrant afterwards drawn up was sufficient: That, as to the prison, if that was a question for the jury, they had disposed of it by finding that it was a reasonably fit and proper place, and, if a question of law, the evidence showed it to be a legal one: *Smith v. Hillier & Clerke*, Cro. Eliz. 167, Ex \*parte \*545] *Evans*, 8 T. R. 172: And that the mere commitment to a wrong gaol was not the subject of an action. Com. Dig. *Imprisonment* (B).

*Cur. adv. vult.*

ERLE, C. J., now delivered the judgment of the Court:—

In this case it has been contended, on behalf of the defendant, that the rule to enter a verdict for him should be made absolute, either on the leave reserved at the trial upon the close of the plaintiff's case, or on the finding of the jury: and we are of opinion that he is entitled to succeed on each of these grounds.

The declaration was for imprisonment.

The plea set out the charter, which empowered the university, by their officers, to make search in the town of Cambridge for common women and other persons suspected of evil, and all such persons as they should, upon such search, find guilty or suspected of evil, to punish by imprisonment or otherwise as to the chancellor or vice-chancellor should seem fit. The plea then proceeded to allege that the charter aforesaid had been confirmed by statute as fully as if it had been repeated verbatim therein; and that the proctors, by command of the university, on a search in Cambridge, found the plaintiff and other women assembled

in a carriage, in company with some scholars of the university, and then reasonably suspecting the plaintiff of evil,—that is, of so being in company with the said scholars for idle, disorderly, and immoral purposes,—apprehended the plaintiff, and brought her before the defendant, the vice-chancellor, in order for her examination touching the premises; whereupon the defendant did hear and examine the plaintiff, and was satisfied of the matters aforesaid, and caused her to be punished by imprisonment in a fit and proper place of confinement.

\*The replication admitted the statute, and took issue upon the rest of the plea. [\*546

The plaintiff in her evidence stated that she had been apprehended under the circumstances alleged in the plea, and brought before the vice-chancellor by the proctors, and that the vice-chancellor made inquiries of her respecting the said circumstances, and heard her answers and her request that reference might be made to some persons for her character, and then pronounced sentence of imprisonment for fourteen days in the Spinning-House, where she was subjected to the treatment complained of in the declaration, the same being, as far as appeared, the usual course. She also stated that she had no disorderly or immoral purpose; that the charge was not made, and the witnesses were not examined, in her presence; that no inquiry was made of the persons to whom she had referred for her character; that there was no examination of any one upon oath; and that there was no warrant of commitment, as far as appeared to her.

The other witnesses for the plaintiff corroborated those statements, and added nothing that is relevant to the present inquiry.

An admission was made by the plaintiff's counsel, that the defendant, as vice-chancellor, had, throughout the proceedings complained of, acted according to the best of his judgment and discretion.

The counsel for the defendant thereupon contended, that, on the assumption of this evidence being true, all the material allegations in the plea, which were put in issue by the replication, were proved thereby; that there was no question of fact for the jury, and that therefore they ought to be directed to give their verdict for the defendant.

The substance of the contention was, that this evidence proved that the vice-chancellor acted throughout \*in the capacity of a Judge, [\*547 holding office under the charter, and adjudicating, according to the best of his judgment, upon a question within his jurisdiction, brought before him for judicial determination; and that, if this was true in fact, it followed that in law no action of trespass could be sustained against him, as Judge, for anything so done by him in that capacity, although there might be a mistaken opinion in respect either of fact or of law.

Upon this point leave was reserved to the defendant to move to enter the verdict for him.

In pursuance of this leave, this rule was obtained; and, after careful attention to the arguments and authorities, we have come to the conclusion that it should be made absolute.

We are of opinion, that, as the charter in express terms invests the vice-chancellor with authority to punish, by imprisonment or otherwise as he should think fit, he thereby became invested with judicial

authority, and a Judge of record, and entitled to all the protection attached by law to the judicial office: and, although it does not appear to us to be essential for the defence to rely on his being a Judge of a Court of record, we are of opinion, that, when he was so empowered, he thereby became a Judge of a Court of record, entitled to the protection attached by law to that office. One important practical consequence resulting from the vice-chancellor being considered as a Judge of a Court of record is this, that the proceedings before him can be proved or disproved by the record thereof only, which record may be made up at any time, whenever it may become necessary to establish an issue duly raised.

In the present case the plaintiff took issue upon the facts tried by a jury, and did not take any issue upon the record of the alleged proceedings, which \*548] would be properly triable by the Court upon inspection of the record after it had been brought here by certiorari.

We are further of opinion that the jurisdiction to hear and determine and pass sentence of imprisonment attached when the proctors, being officers of the university, brought before the vice-chancellor for adjudication a person found by them in Cambridge, and apprehended by them there as being a person suspected of evil, within the meaning of the charter; that, as the charter defines no form of proceeding, either for the hearing, or the determination, or the committal, an action of trespass could not be sustained for any of the judicial acts complained of. The authorities support this opinion.

The case of *Groenvelt v. Burwell*, 1 *Ld. Raym.* 454, bears a strong analogy to the present. There, the declaration was for false imprisonment. The justification showed that a charter of Henry VIII., confirmed by statute, invested the censors of the College of Physicians with authority to supervise all physicians practising medicine in London, and to punish them for bad practice, by fine and imprisonment; that the plaintiff used the faculty of medicine in London, and attended a patient, and treated her unskilfully; that a complaint was made to the censors, who inquired into it, and heard witnesses and the plaintiff, and adjudged him guilty of bad practice, and sentenced him to imprisonment. The plaintiff argued that the plea was bad because it did not show sufficient jurisdiction in the censors. But Holt, C. J., delivering the judgment of the Court, decided that the censors had entitled themselves to a sufficient jurisdiction,—first, over the person of the plaintiff, because he had practised in London,—secondly, over the subject-matter, viz., the un-  
\*549] skilful administration of physic,—thirdly, over the fact for which he was punished, because it was committed within the jurisdiction, viz., in London: and he goes on to say, that, where a man has jurisdiction over another man in all these particulars, it is apparent, that, whether the matter of fact be such as is alleged or not, it is not traversable, but the plaintiff is concluded. This judgment applies to the plea now in question. The vice-chancellor has the same power of adjudication over the persons apprehended in Cambridge by the proctors, as the censors had over persons practising medicine in London; also the same power over the subject-matter, viz., the liability of the plaintiff to be apprehended on the ground stated in the plea, as the censors had over the unskilful administrators of physic; also the same power in respect

of the place, viz., Cambridge, as the censors had in respect of London. Lord Holt further says that the fact of which the plaintiff is convicted is not traversable, because the authority of the defendants is absolute to hear and determine the offence, and that persons who are Judges by law shall not be liable to have their judgments examined in actions brought against them. He further shows, by authorities, that a jurisdiction to fine and imprison, created by statute, is a Court of record. Upon these principles, he answers all the objections made in that case to the course of proceeding, and, among others, the objection that the witnesses had not been examined on oath.

The rule that a judicial officer cannot be sued for an adjudication according to the best of his judgment upon a matter within his jurisdiction, and also the rule that a matter of fact so adjudicated by him cannot be put in issue in an action against him, have been uniformly maintained. We shall, therefore, only refer shortly to some other cases showing the variety of occasions on which these rules have been applied; and \*we begin with the justly-celebrated judgment of Powell, [\*550 J., in *Gwynne v. Poole*, 2 Lutw. 387. There, the defendant was held not to be liable in trespass, although, as Judge of an inferior Court, he had caused the plaintiff to be arrested in an action where the cause of action arose out of his jurisdiction; and, although the *capias* was issued without previous summons, and was not made returnable at a certain time, yet he was justified because he acted as Judge in a matter over which *he had reason to believe* that he had jurisdiction. In *Floyd v. Barker*, 12 Co. Rep. 223, the Judge and the grand jury were held not liable to be sued in the Star Chamber for a conspiracy in respect of their acts in Court, in convicting of felony. In *Hamond v. Howell*, 2 Mod. 219, the Judge who committed for an alleged contempt, under a warrant showing that in truth no contempt had been committed, was held not liable in trespass, because he had jurisdiction over the question, and his mistaken judgment, together with the void warrant founded thereon, was no cause of action. In *Cave v. Mountain*, 1 Scott, N. R. 132, 1 M. & G. 257 (E. C. L. R. vol. 39), the justice who committed the plaintiff on an information which contained no legal evidence either of any offence or of the plaintiff's participation in that which was supposed to be an offence, was held not to be liable in trespass, because the information was considered to be directed against an offence over which the justice had jurisdiction, if there had been any proof thereof. In *Metcalf v. Hodson*, Hutton 120, the defendant was held not liable for taking insufficient bail in a cause in a local Court, because in that Court it was a judicial act by him. In *Garnett v. Ferrand*, 6 B. & C. 615 (E. C. L. R. vol. 13), 9 D. & R. 657 (E. C. L. R. vol. 22), the coroner who removed the plaintiff from the place of an inquest was held not liable in trespass, as the removal was ordered by him in a \*judicial capacity. In *Tozer v. Child*, 7 Ellis & B. 377 (E. C. L. R. [\*551 vol. 90), the churchwarden was held not liable for refusing a lawful vote in a vestry, because, although he was acting partly in a ministerial capacity in receiving the votes, yet he was also acting partly in a judicial capacity in refusing a vote, and in that capacity he was not liable for a mistake, if he acted according to the best of his judgment. In *Calder v. Halkett*, 3 Moore, P. C. 28, the magistrate having jurisdiction over Asiatics in Bengal, but not over Europeans, was held not liable in

trespass for an apprehension of the plaintiff under a warrant issued by him, he not knowing the plaintiff to be European. The Privy Council say that trespass will not lie for a judicial act without jurisdiction, unless the Judge had the means of knowing the defect of jurisdiction: and it lies on the plaintiff in every case to prove that fact. In *Houlden v. Smith*, 14 Q. B. 841 (E. C. L. R. vol. 68), the Judge of the County Court was held liable in trespass because he was within the exception thus laid down, and had the means of knowing that he had no jurisdiction. In *Taaffe v. Lord Downes*, 8 Moore, P. C. 36, n., the Judge was justified by a plea in trespass showing a warrant issued by him in his capacity of Judge, although the plea did not show that the warrant was lawful, but was purposely confined to the right of a Judge to protection. See the judgment of Fox, J., Id. 50.

Throughout these cases, and many others, the vital importance of securing independence for every judicial mind is earnestly recognised. The principle applies in its full extent to the judicial duty to be performed by the vice-chancellor, and he is therefore entitled to the same protection. As the defendant had jurisdiction in respect of the matter, and the person, and the place, it does not appear to us to be essential \*552] to rely on his being a Judge of a Court of record: but we add \*some further authorities showing that the power to imprison made him a Judge of record.

The statute of Westminster 2 empowered certain auditors to imprison bailiffs who should be in arrear in their accounts. Lord Coke says by this Act the auditors are Judges of record: 2 Inst. 380. In *Godfrey's Case*, 11 Co. Rep. 43 b, it is said no Court can fine or imprison which is not a Court of record. In *Beecher's Case*, 8 Co. Rep. 58, it is said, "*Nulla curia quæ recordum non habet potest imponere finem, neque aliquem mandare carceri, quia ista spectant tantummodo ad curias de recordo.*" In the report of *Groenvelt's Case*, under the name of *Dr. Grenville v. The College of Physicians*, 12 Mod. 388, it is said, that, wherever there is a power de novo created by Parliament to fine and imprison, either of these two makes it a Court of record. Although in *Dr. Bonham's Case*, 8 Co. Rep. 107, the same principle is not affirmed; yet all that Lord Coke says there extrajudicially after deciding that the action lay, has been doubted by Lord Holt in *Groenvelt's Case*, and attributed to the desire of Lord Coke to support a graduate of Cambridge, and to prevent what he considered an affront of the university, which must be venerated.

The plaintiff's counsel, in showing cause against this rule, relied mainly on objections in relation either to the hearing, or the warrant, or the prison: and we proceed to advert to each of them in their order.

In respect of the hearing, it appeared that the plaintiff stated what she chose in answer to inquiries concerning the charge; that the vice-chancellor received information from the proctors without oath; and that the persons to whom the plaintiff referred were not sent for. As to the inquiries addressed to the plaintiff, they seem to us to be reasonable, in order to give her an opportunity of answering or explaining the \*553] facts. After \*hearing her answers, the vice-chancellor might with reason be satisfied that the facts existed on which the proctors acted, and was justified in adjudicating thereon. As to receiving information not upon oath, there is no express provision in the

charter enabling the vice-chancellor to administer an oath; and the cases show that it was not for this purpose essential to do so. In *Dr. Groenvelt's Case*, the objection was made; but Lord Holt was clear that the omission to hear evidence upon oath would not make the defendant liable in trespass: 1 Lord Raym. 472. In *Basten v. Carew*, 3 B. & C. 653 (E. C. L. R. vol. 10), 5 D. & R. 558 (E. C. L. R. vol. 16), the objection was made that the magistrates, acting judicially, must proceed on evidence given under the sanction of an oath: but the Court decided against it, and held, that, where the statute creating the jurisdiction did not direct the justices to make inquiry upon oath, the Court could not require it to be done. In that case, the statute related to vacant possession, to be ascertained in great measure by personal inspection, and so within the knowledge of the justices. The jurisdiction here in question relates to matters supposed to come within the observation of the officers of the university, upon a search properly made by them, and also supposed to require a summary interference on their part. Unless the legislature had expressly declared it, we should not presume an intention to make evidence upon oath essential for this purpose. With respect to the objection that the defendant did not send to the persons referred to by the plaintiff for her character, he was not under any legal obligation so to do; it was a matter for his own discretion; and, if he acted therein according to the best of his judgment, as it was admitted that he did, his omission to make this inquiry was no ground for maintaining trespass. We must add, that it would in our opinion be most inconvenient and objectionable that the validity of \*judicial proceedings should depend on the opinion of a jury whether [\*554 there had been a sufficient hearing of the parties: and, indeed, as we have already observed (*antè*, p. 548), the question whether there has been such a hearing, must, in the case of a Court of record, be decided conclusively by the record itself.

With respect to the warrant, it was proved that a writing was made when the plaintiff was committed; but that writing was not produced by the defendant when called for, after notice to produce: and we assume that it was void as a warrant. We have before observed, that, in *Hamond v. Howell*, 2 Mod. 218, the warrant was void on the face of it: so it was in *Groenvelt v. Burwell*; for, in each case, the prisoner had been discharged by habeas corpus: nevertheless, the action did not lie in either: therefore, if a void warrant is the same as no warrant, the absence of a warrant would not sustain the action. We would further observe that all Judges of record have power to commit to the custody of their officer, *sedente curia*, by oral command, without any warrant made at the time.<sup>(a)</sup> This proceeds upon the ground that there is, in contemplation of law, a record of such commitment, which record may be drawn up when necessary: *Throgmorton v. Allen*, 2 Roll. Abr. *Trespass*, C, 558; and see the judgment of Parke, B., in *Watson v. Bodell*, 14 M. & W. 70.† Indeed, for a like reason, no warrant is required for the execution of a sentence of death: 2 Hale's P. C. c. 57, p. 409. The rule thus established seems peculiarly applicable to the case of a committal to the gaol peculiarly appropriated to the Court, as is the present case. A warrant seems no more necessary or useful, under those circumstances, than would a written authority be from the

(a) See *Ex parte Fernandez*, *antè*, p. 3, and the authorities there referred to.

keeper of the gaol to the warder who locks up the cell. Therefore, upon this ground also, the defendant is entitled to succeed, \*the  
\*555] vice-chancellor being a Judge of record. Again, it has been held that a prisoner is in lawful custody, although committed to a prison for the purpose of being again brought up for rehearing, without any warrant, commitment, or written authority. One Gooding had assisted a prisoner, so committed, to escape, and, being indicted therefor, contended that the custody was not lawful on that account, and, if so, there was no offence: but the Judges decided unanimously that the custody was lawful, notwithstanding there was no writing: *The King v. Gooding*, cited in *Davis v. Capper*, 10 B. & C. 34 (E. C. L. R. vol. 21), 5 M. & R. 53. Now, the jurisdiction under the charter is left largely to the discretion of the vice-chancellor; and an imprisonment thereunder may be thought to be in closer analogy with a commitment to suppress immediate disorder, and for further inquiry, than with a commitment in execution of a sentence for a definite crime. The description of the offence is extremely undefined, and the power is, to imprison, not only those who are guilty, but also those who are suspected of evil. In trusting this wide discretion to the university, the legislature must have considered that it would be exercised only according to need, for suppressing immediate disorder: and it seems essential for its reasonable exercise that there should be power to make further inquiry by the officers of the university, and to remit the imprisonment whenever the result of such inquiry should make it right so to do, as was the case with the present plaintiff. It is not, however, necessary to pursue this subject further. Suffice it to observe that the proposition advanced in argument, that the law requires a warrant in every case of commitment, is clearly erroneous. We therefore are of opinion that a committal in the exercise of this peculiar jurisdiction, where no special method is directed by the  
\*556] statute, although it was not \*shown to be made under a warrant, gives no cause of action. The case of *Hutchinson v. Lowndes*, 4 B. & Ad. 118 (E. C. L. R. vol. 24), was relied on for the plaintiff to prove the contrary. There, the defendant was held liable in trespass because he committed the plaintiff to prison orally, without any warrant in writing, and kept him in prison beyond a time reasonably required for making out a warrant: but the ground of the judgment is expressed to be, because the statute which created the special authority under which the committal was made also enacted that the authority so created should be exercised by making a warrant in writing. The decision, confined to that ground, is, by implication, an authority against an action of trespass for a commitment without a warrant, where the statute does not enact that the newly-created authority shall be exercised by warrant, and where there is no implication that the legislature intended to make a warrant essential. We should further observe, in respect to *Hutchinson v. Lowndes*, that the plea was the general issue *by statute*; but, if the justification had been pleaded in extenso, as here, the plaintiff could not have recovered for the excess of jurisdiction in imprisoning beyond the time so reasonably required, without a special replication, or a new assignment of excess. So, if the plaintiff here relied on any excess beyond the justification, she could not avail herself of it without so pleading.

With respect to the objection that the place of imprisonment was

unlawful, because it was not proved to be a common gaol, that also appears to us to be unfounded. In support of it the plaintiff relied on the general rules stated in Bacon's Abridgment, *Gaol and Gaoler* (A), that gaols can only be erected by Act of Parliament, and on the statute of Henry IV., requiring a commitment to be made to a common gaol, and on the \*absence of any grant of a gaol to the university. [\*557 But, considering the purpose for which the jurisdiction was created, and the nature of the fact for which the party was to be imprisoned, and referring to the observations before made on this point in relation to the absence of a warrant, and considering also that the place of confinement appeared to be the accustomed place used for that purpose by the university, we are bound to presume the usage to be lawful till the contrary is shown,—which was not done here. There may be a lawful gaol in the keeping of a subject, by prescription or grant: see 2 Inst. 100, and the statute 19 H. 7, c. 10, giving the custody of all the King's gaols, prisons, and prisoners to the sheriffs, (a) and putting an end to many gaols held by individuals, except all gaols whereof any person or corporation have the keeping of estate of inheritance or by succession. It well consists with history (see 4 Inst. 255), and the evidence in this cause, that the university had, at the time of that statute, if not from its very foundation, among its privileges and franchises, a place for the confinement of some classes of prisoners committed by its own officers, and that the same privilege and franchise has continued by succession to the present time, and so made the place a lawful prison for the purpose to which it was applied. In *The Queen v. Archdall*, 8 Ad. & E. 281 (E. C. L. R. vol. 35), 3 Nev. & P. 696, the right of the vice-chancellor to have the sole control over granting licenses for the sale of beer in Cambridge, was disputed; and the judgment was for the university, for reasons which may be adopted in the present case. The Court there took notice that a control of the most absolute kind in certain respects was necessary for the preservation of discipline and morals, and the prevention of the \*disorder which the age and dispositions of the younger students would tend to produce; that the university, [\*558 generally a favoured body, was not unlikely to procure from the Crown what might reasonably be asked for, and, being a learned body, would procure it in such a form as would render the grant valid. The Court further felt itself bound to presume in favour of the existing user, and refused to call on the vice-chancellor to justify the exercise of an ancient practice. If the place was lawful, it was not contended that the treatment therein would, upon these pleadings and this evidence, constitute a substantive cause of action against the defendant.

For these reasons, we think that the defendant is entitled to make the rule absolute to enter the verdict for him, pursuant to the leave reserved at the close of the plaintiff's case. We consider that the replication, admitting the statute which confirmed the charter set out in the plea as fully as if it was repeated verbatim therein, admitted the charter as set out. But, if it was not thereby admitted, then, on giving the charter in evidence, the right of the defendant would be the same.

The other part of the rule,—for entering the verdict for the defendant upon the special finding of the jury,—is thus rendered immaterial: but the general importance of the case induces us to make some remarks

(a) See the 21 & 22 Vict. c. 22.

upon the phases which it presents from this latter point of view. The contested allegations in the plea were disposed of separately at the trial. The construction of the charter, and the absence of a warrant, were within the province of the Judge, and not for the jury. Of the other allegations, three only were required to be left to the jury separately, viz., first, whether the proctors had reasonable cause for suspicion of the \*559] plaintiff; secondly, whether the vice-chancellor \*heard and examined the plaintiff; thirdly, whether the place of imprisonment, and the treatment therein, were lawful. The jury found that the proctors had reasonable cause for suspicion, and that the complaint of the prison and the treatment therein was unfounded: but, in respect of the hearing and the examination of the plaintiff, they found that the defendant had not made due inquiry into her character, and (a matter clearly beyond their province) that the punishment was undeserved. This finding of the jury must be considered together with the course of proceeding at the trial.

The facts deposed to by the plaintiff, were, for the most part, undisputed,—being confirmed by the evidence for the defendant. In respect of the facts themselves, there was no question: in respect of the effect of those facts, there was contest. Thus, the circumstances of the apprehension were not in dispute; but the contest was, whether, under those circumstances, the proctors had reasonable cause for suspicion. Thus, also, the statement of the plaintiff, that the vice-chancellor made inquiries of her, and heard her answers, was not in dispute; but the contest was, whether he had a right to put those inquiries to her, or to decide without hearing testimony on oath, or to decide without sending to refer to the persons mentioned by the plaintiff as knowing her character. The allegation was that the defendant heard and examined the plaintiff. The plaintiff contended that the jury ought not to find that he had done so, if they were of opinion that the hearing and examination was not properly conducted in all or either of these respects. It appears by the finding, and by what passed at the time of the verdict, that the jury were of opinion that the hearing was not properly conducted in this respect,—that the defendant did not make due inquiry into the plaintiff's \*560] character. \*Now, although they meant their finding to support the plaintiff's case, they did not mean to do so at the expense of truth, nor to disaffirm the plaintiff's account of what passed between her and the defendant when she was brought before him. It was accepted as an imperfect verdict, rather than that the trial should be rendered abortive by reason of the jury not coming to an agreement: and we consider we give effect to the intention of the jury if we put this construction upon the whole of their finding,—that all the allegations in the plea are proved, with this exception, that, after the hearing, the defendant did not make such due inquiry into the plaintiff's character as he was in their opinion bound to do. In this sense, it certainly did not amount to a verdict for the plaintiff, because there is no issue upon the question whether the defendant was bound to make the inquiry which the jury required: and we are clear that he was not legally bound to do so. It therefore was, in point of law, a verdict for the defendant, because it affirmed the truth of every fact and every inference necessary to support the defence, and which it was for the jury to decide, and it

denied only an immaterial fact, which ought not to affect the decision of the case.

The result is, that the verdict entered for the plaintiff on this finding should be set aside, and the verdict entered thereon for the defendant, pursuant to the leave reserved.

Rule absolute.

The authorities in the United States are very clear that no action will lie against a Judge of a Court of record for what he does in the course of his office in the absence of malice, if at all. It would be destructive to the independence of the judiciary, the value of which can never be over estimated, and least of all in this country, if the Judge were exposed to the vengeance of a disappointed suitor. No honest decision could be expected from a man who must balance the risk of following the right. He would inevitably be governed in any doubtful case by his opinion of the relative power or influence of the contending parties. For his own protection, he would at least shape his course so that whatever the event of the cause he himself shall escape.

The rule was laid down in general terms in *Ross v. Rittenhouse*, 2 Dall. 160, 164; 1 Yeates 458. In *Brodie v. Rutledge*, 2 Bay 69, it was held that the only remedy was by impeachment. There the prothonotary had even refused to issue a writ against the Judge, and the Court held that he was right in so doing. *Phelps v. Sill*, 1 Day 315, decides that no action will lie against a judge of probate for neglecting to take security from a guardian. In *Reid v. Flood*, 2 Nott & M'Cord 168, the same protection was held to extend to a justice of the peace who exceeded his jurisdiction, unless he

acted wilfully. The general principle was either decided or asserted in *Upshaw v. Oliver*, Dudley (Geo.) 241; *Thompson v. Lyle*, 3 W. & S. 168; *M'Dowel v. Van Deusen*, 12 Johns. 356; *Yates v. Lansing*, 9 Id. 395; 5 Id. 282; *Cunningham v. Bucklin*, 8 Cowen 178. The case of *Yates v. Lansing* was a very strong one. There the plaintiff had been committed for a contempt by the Chancellor of the state of New York, subsequently discharged by a Judge of the Supreme Court on habeas corpus, and then recommitted by the Chancellor. He thereupon brought suit against the latter in the Supreme Court, which, however, held that the action would not lie. The Court of Appeals having afterwards discharged the plaintiff on habeas corpus, on the ground that the Chancellor had no jurisdiction to commit for contempt, he then took a writ of error in his action against the Chancellor, but the Court of Appeals affirmed the judgment in the Court below, thus establishing the civil irresponsibility of a Judge of a superior Court, even for an act beyond his jurisdiction. It may be added that in *Cunningham v. Bucklin*, 8 Cowen 178, it was held that the doctrine applied to a commissioner in insolvency, whose Court was declared by statute to be a Court of record, even though it were shown that he acted corruptly. See also the case of *Williamson v. Lewis*, 3 Wright.

## \*561] \*REYNOLDS v. WHEELER. June 10.

A., for the purpose of raising money, drew a bill upon B., which B. accepted. Being unable to get the bill discounted without a third name, A. procured C. to endorse it. The bill being unpaid at maturity, the holder agreed to renew it; and accordingly a fresh bill was drawn by B. upon A., and endorsed by C. B. having been compelled to pay the whole amount,—Held, that he was entitled to sue C. for contribution.

ONE Cheeseman, a contractor at Brighton, being in want of money, applied to Reynolds, the plaintiff, to accommodate him with his acceptance for 150*l.*, and, upon his consenting to do so, a bill for that amount was drawn by Cheeseman upon and accepted by Reynolds. Cheeseman's bankers declining to discount the bill without having another name to it, Wheeler at Cheeseman's request endorsed it. On its arriving at maturity, Cheeseman prevailed upon the holders to renew the bill; and the new bill was drawn by Reynolds upon Cheeseman, and endorsed by Wheeler. Reynolds having been compelled to pay this second bill, brought this action against Wheeler to recover contribution, and, at the trial before Wightman, J., at the last assizes for Sussex, obtained a verdict for 75*l.*; leave being reserved to the defendant to move to enter a verdict for him or a nonsuit, if the Court should be of opinion, that, there being no joint liability in the plaintiff and the defendant, there was no implied liability to contribution.

*Bovill*, Q. C., in Easter Term last, obtained a rule nisi accordingly.

*Tompson Chitty* now showed cause.—Both plaintiff and defendant became parties to this bill for the accommodation of Cheeseman, and thereby became joint sureties for him. It is quite immaterial how the parties became sureties, if they are in point of fact co-sureties for the principal,—whether by the same or by separate instruments. Whether one be liable primarily and the other in a secondary degree makes no  
 \*562] \*difference: the law regards only the substance of the transaction. In *Deering v. The Earl of Winchelsea*, 2 Bos. & P. 260, 1 Cox 318, it was expressly held, that, if A., B., and C. become bound as sureties for D. in three separate bonds, and any one of them be compelled to pay the whole debt of the principal, the two others are compellable to contribute in proportion to the penalties of their respective bonds.(a) *Eyre*, C. J., delivering the opinion of the Court, there said: “In the particular case of sureties, it is admitted that one surety may compel another to contribute to the debt for which they are jointly bound. On what principle? Can it be because they are jointly bound? What if they are jointly and severally bound? What if severally bound by the same or different instruments? In every one of those cases, sureties have a common interest and a common burthen. They are bound as effectually quoad contribution as if bound in one instrument, with this difference only, that the sums in each instrument ascertain the proportions, whereas, if they were all joined in the same engagement, they must all contribute equally.” In treating of contribution between sureties, *Dr. Story*, in his *Equity Jurisprudence*, § 493, says: “The claim certainly has its foundation in the clearest principles of natural justice; for, as all are equally bound, and are equally relieved, it seems but just that in such a case all should contribute in proportion towards a benefit obtained by all, upon the maxim *Qui sentit commodum sentire*

(a) And see *Sayer v. Melson*, 1 Vern. 456.

debet et onus. And the doctrine has an equal foundation in morals, since no one ought to profit by another man's loss, where he himself has incurred a like responsibility. Any other rule would put it in the power of the creditor to select his own \*victim, and, upon motives of [\*563 mere caprice or favouritism, to make a common burthen a most gross personal oppression. It would be against equity for the creditor to exact or receive payment from one, and to permit, or by his conduct to cause, the other debtors to be exempt from payment. And the creditor is always bound in conscience, although he is seldom bound by contract, as far as he is able, to put the party paying the debt upon the same footing with those who are equally bound. It can be no matter of surprise, therefore, to find that Courts of equity adopted and acted upon this salutary doctrine, as equally well founded in equity and morality, at a very early period. The ground of relief does not, therefore, stand upon any notion of mutual contract, express or implied, between the sureties, to indemnify each other in proportion (as has sometimes been argued); but it arises from principles of equity, independent of contract. If the doctrine were otherwise, a surety would be utterly without relief; because he has not, either in equity or at law, any title to compel the obligee to assign over the bond to him upon his making payment, or otherwise discharging the obligation." And in § 495, the learned author says: "Originally, it seems to have been questioned whether contribution between sureties, unless founded upon some positive contract between them, incurring such a liability, was a matter capable of being enforced at law. But there is now no doubt that it may be enforced at law as well as in equity, although no such contract exists. And it matters not in case of a debt, whether the sureties are jointly and severally bound, or only severally; or whether their suretyship arises under the same obligation or instrument, or under divers obligations or instruments, if all the instruments are for the same identical debt." Here, the real transaction is, that \*Reynolds [\*564 and Wheeler jointly lend their names to Cheeseman to enable him to raise money. Being co-sureties, it is immaterial by what form or number of instruments they became so. It results from the law, that, if one is compelled to pay the whole debt, he has a right to sue his co-surety for contribution. [BYLES, J.—In equity, I believe, it is held that a surety who has been compelled to pay the whole amount, is entitled to contribution, even though he did not at the time of entering into the obligation know that he had a co-surety. This would strike one as remarkable, seeing that the knowledge that he had a co-surety, and consequently a right of contribution, might have been the inducement on the part of each to enter into the engagement.] In equity, as at law, the real transaction may always be shown.

*Bovill, Q. C.*, in support of the rule.—This is not a case of joint suretyship at all. The first bill was drawn by Cheeseman upon Reynolds, and the defendant, Wheeler, by afterwards endorsing it, simply guarantied to the holder that the bill should be paid either by the acceptor or by the drawer. In the second bill, the drawer and acceptor were reversed. When Reynolds accepted the first bill, he did so without any reliance upon the joint suretyship of Wheeler, which at that time was not contemplated. Upon no principle of law or reason, therefore, could the former be entitled to call on the latter for contribution.

ERLE, C. J.—I am of opinion that this rule should be discharged. The substance of the transaction is this:—Cheeseman was in want of money, and applied to Reynolds and to Wheeler to lend him their names in order to obtain it. If the money had been raised by the joint and \*565] several note or bond of the three, \*it could not for a moment have been contended that Reynolds, paying the whole, would not have been entitled to call upon Wheeler for contribution. The machinery adopted here was, the drawing of a bill by Cheeseman upon Reynolds, and the endorsement of it by Wheeler. As between these three parties and the holders, the acceptor would be primarily liable, and, on his failure to pay, recourse would be had to the drawer and the endorser. But their relation to the holder has no bearing on their relation to one another. Reynolds and Wheeler each became surety for the same debt or liability of their principal, Cheeseman. Reynolds, therefore, clearly had a right to call upon Wheeler for contribution.

WILLIAMS, J.—I am of the same opinion. There was evidence from which a promise on the part of the defendant to pay to the plaintiff contribution in respect of what he might have been called upon to pay on Cheeseman's account might be implied. There is some little difficulty in understanding how a contract for contribution can be implied under such circumstances as these. Parke, B., deals with that matter in the case of *Kemp v. Finden*, 12 M. & W. 421, 424,† where he says: "In *Craythorne v. Swinburne*, 14 Ves. 164, the right of a surety to call upon his co-surety for contribution is treated by Lord Eldon as depending rather upon a principle of equity than upon contract, unless in this sense, that a contract may be inferred upon the implied knowledge by all persons of that principle." That has been followed by a host of authorities which have established the principle, that, where two or more are sureties for the debt of another, and one of them has been called upon to pay and has paid more than his share, he may sue his co-sureties \*566] for reimbursement to the extent of their respective proportions. If the relation of surety subsists, he is entitled to contribution, and we are entitled to disregard the form of the instrument. The recent decisions as to suretyship, show, that, not only in actions like the present, but also in cases where the question is whether the surety has been discharged or not, the form of the instrument may be wholly disregarded.

The rest of the Court concurring,

Rule discharged.

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The American authorities on the subject of contribution between co-sureties, will be found collected and discussed in the notes to *Dering v. Earl of Winchelsea*, 1 Leading Cases in Eq., 3d Am. Ed. 143 a. In conformity with the decision in the text see *Stout v. Vanse*, 1 Rob. Va. 169; *Warner v. Price*, 3 Wend. 397; *Norton v. Coons*, 2 Seld. 33; *Woodworth v. Bowles*, 5 Ind. 277; *Sisson v. Barrett*, 2 Comst. 406; *Daniel v. M'Rae*, 2 Hawks 590; *Bell v. Jasper*, 2 Ind. Eq. 597.

NAYLOR and Another v. MORTIMORE. *June 8.*

The defendant, in August, 1860, presented a petition to the Court of Bankruptcy under the 211th section of the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), and obtained the usual order for the protection of his person and property from all process until further order, —which protection was from time to time renewed until the 5th of June, 1861, and his proposal (to pay 10s. in the pound by certain instalments) was assented to by the requisite number of creditors, and approved and confirmed by the commissioner.

On the 5th of March and 4th of April, 1861, the plaintiffs obtained two judgments against the defendant; and on the 21st of April, 1861 (and whilst his protection was in force), they commenced an action against him upon those judgments:—

The Court refused to stay the proceedings therein.

ON the 7th of March, 1861, an action was brought by the plaintiffs against the defendant as the acceptor of a bill of exchange for 1132*l.* 14*s.* 7*d.*, in which action judgment was signed on the 25th of March, 1861, for 1158*l.* 15*s.* 9*d.* debt and costs: and on the same day a second action was brought by the plaintiffs against the defendant as the acceptor of two bills of exchange for 955*l.* 7*s.* 7*d.* and 1221*l.* 4*s.* 1*d.* respectively, in which last-mentioned action judgment was signed on the 4th of April, 1861, for 2257*l.* 9*s.* 6*d.*, debt and costs and interest.

On the 21st of April, 1861, the plaintiffs commenced an action against the defendant upon the above judgments.

\*On the 31st of August, 1860, the defendant petitioned the Court of Bankruptcy under the 211th and subsequent sections [\*567 of the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), praying that his person and property might be protected from all process, and that such proposal as he might be able to make, or such modification thereof as by three-fifths in number and value of his creditors might be determined, might be carried into effect under the superintendence and control of the Court. An order was thereupon made by the commissioner that the person and property of the defendant should be protected from all process until the 26th of September then next, or until further order; and a private sitting was appointed to be held on that day at the Court of Bankruptcy in Basinghall Street for the proof of debts and for the purpose of obtaining the assent of three-fifths in number and value of the creditors who should have proved debts to the amount of 10*l.* to a proposal for the future payment or the compromise of the defendant's debts and engagements, &c.; and an assignee was appointed. The plaintiffs had due notice of the above and of the subsequent sittings. The petitioner duly filed an account and proposal; and the plaintiffs proved their debt in respect of the before-mentioned bills. The first private sitting was adjourned to the 4th of October, and further adjourned to the 25th October, 1860.

On the 13th October, 1860, the petitioner filed a modified proposal; and, at the meeting held on the 25th, more than three-fifths in number and value of the creditors who had proved debts to the amount of 10*l.* assented to such modified proposal; but the commissioner, upon the application of the plaintiffs, adjudged him a bankrupt, and adjourned the petition and all further proceedings into the public Court. The \*decision of the commissioner was reversed by the Lords Justices, [\*568 on appeal.

In consequence of the delay thus occasioned, the modified proposal filed on the 13th of October, 1860, could not be carried out; and a

further modified proposal was filed on the 28th of February, 1861, to pay the creditors 10s. in the pound by certain instalments. An adjourned meeting was held on the 13th of March, 1861, at which this last-mentioned proposal was assented to by more than three-fifths in number and value of the creditors who had proved debts to the amount of 10l.

A second sitting was appointed for and duly held on the 3d of April, 1861, when the further modified proposal was assented to by all the creditors (being more than the required number) except the plaintiffs; and on the 10th the proposal received the approval and confirmation of the Court of Bankruptcy, and was duly filed and certified; and the petitioner's protection from arrest was continued till the 5th of June, or until further order.

The money and securities to which the plaintiffs were entitled under the above proposal were duly tendered to one of the plaintiffs, but he declined to receive them.

Upon an affidavit setting forth the above facts, and further stating that the plaintiffs had never attempted to enforce execution upon the judgments so obtained against the defendant, and that the deponent (the defendant) was advised and believed that the action was brought with a view to vex and harass him, and to evade the effect of the statute, and to defeat the proceedings taken thereunder,

*Manisty*, Q. C., on a former day in this term, obtained a rule nisi to \*569] stay the proceedings in this \*action. He submitted that the bringing an action upon the judgments was a useless and vexatious proceeding, inasmuch as the protection would be a bar to any execution thereon; and the defendant was placed in this difficulty, that he could not plead his protection in bar, because it might be that he might fail to carry out the arrangement, and then the protection would be gone.

*Lush*, Q. C., and *J. Brown*, showed cause.—This is a perfectly novel application. The plaintiffs have an undoubted right to bring their action upon the judgments they have obtained. They conceive that the whole proceedings before the commissioner were irregular and abortive; and they are advised that this is the most convenient mode of trying the question. [WILLIAMS, J.—There is nothing in the Bankrupt Act to prevent the bringing of an action.] If the proceedings before the commissioner constitute a bar, the defendant may plead them under the 216th section. Such pleas have been pleaded without objection: see *Alcard v. Wesson*, 7 Exch. 753.† The Court called on

*Manisty* and *Holland* to support the rule.—A plaintiff has no right to bring an action and thereby harass the defendant with proceedings which must be abortive. An execution issued against the person or the goods of the defendant after the protecting order would clearly be set aside: *Jones v. Simpson*, 3 Hurlst. & N. 836;† *Bellhouse v. Mellor*, 4 Hurlst. & N. 116;† *Williams v. Dray*, 29 Law J., Q. B. 86; *Tomline v. Cadman*, 6 C. B. N. S. 733 (E. C. L. R. vol. 95). The ground upon which it is put by Pollock, C. B., in *Jones v. Simpson*, is, that “a writ which cannot be executed ought not to be issued.” [BYLES, J.—What harm can the proceeding do the defendant?] It puts him to costs.

\*570] \*ERLE, C. J.—This is a rule calling upon us to stay the proceedings in an action upon certain judgments, on the ground that

it has been brought after the defendant has obtained an interim order of protection under the Bankrupt Law Consolidation Act, 1849, and therefore the only effect can be to vex and oppress the defendant and put him to useless expense. I am of opinion that the rule ought to be discharged. It is clear that the Bankrupt Act, by giving the petitioner protection from process against his person and property, and being silent as to the continuing of any action against him, intended to reserve to the plaintiff the right which every subject has to sue his debtor and obtain judgment. I do not find that any section of the statute has taken away that right. Does it, then, make any difference that the action is brought upon a judgment? I think not. To bring an action upon a judgment, instead of issuing execution thereon, is sometimes vexatious; and, to remedy that, the legislature made a general provision by the 43 G. 3, c. 46, s. 4, that a plaintiff should recover no costs in an action upon a judgment, without the order of the Court. But there again the right of bringing the action is by implication recognised. As to the suggestion that the defendant will be put to unnecessary costs, it is enough to say that he may avoid that by suffering judgment by default. Mr. *Manisty* asks us to interpose, on the ground that, under the circumstances, the action upon the judgments can only be brought for the purpose of vexing and harassing the defendant. The answer I would make to that is, that it is enough for me to be told that the plaintiffs are advised that they have a substantial interest in persevering in the action. In the absence, therefore, of any intelligible grievance inflicted upon the defendant, I do not think we are \*justified in interfering. The rule must be discharged, and discharged with [\*571 costs.

WILLIAMS, J.—I am of the same opinion. Whatever may be the real object of the plaintiffs in bringing the action, or of the defendant in resisting it, it seems to me to be quite clear that we have no power to interfere with the right which the law gives to every suitor, except where such interference is warranted by some specific legislative provision. Here there is none such.

WILLES, J., concurred.

BYLES, J.—I also am of opinion that this rule must be discharged. The case begins with an admitted right on the part of the defendants to bring their action. The judgments in question are, it is true, modern judgments. But, how would the matter have stood if the period of limitation for suing on a judgment-debt had nearly run out? I think the certificate should be pleaded. If the order of the commissioner is nothing more than a protection of the petitioner's person and property from execution, the present application is premature. If the matter be doubtful, then it is open to the objection that we are asked on motion to decide a doubtful question which ought to be left to the ordinary course of proceeding, when our decision, if erroneous, might be set right. There is no precedent for our interference in this way; and the reason and convenience of the thing are opposed to it.

Rule discharged, with costs.

\*572]

\*NORTH v. SMITH. May 25.

The plaintiff was driving a wagon with three horses along a highway, walking in the usual way at the head of the leading horse, on his proper side of the road. The defendant and his groom were riding by at a foot pace (meeting the wagon on the wrong side), when, just as he passed the plaintiff, the groom touched his horse with a spur, and the horse kicked out and struck the plaintiff:—Held, that the act of using the spur when so near to the plaintiff was such an improper act on the part of the groom as to justify the jury in finding the defendant to have been guilty of negligence.

THIS was an action for negligence, tried before Erle, C. J., at the sittings in London after the last Hilary Term.

The facts were as follows:—The plaintiff was proceeding along a road in Southwark with his master's wagon drawn by three horses. The road was about twenty-five feet wide, and the wagon was within four feet of the kerb on the near side; and the plaintiff was walking within that space at the head of the leading horse. The defendant was riding at a foot pace, accompanied by his groom, coming from the opposite direction. The groom, just as he had passed the plaintiff, his master having put his horse into a trot, spurred the horse he was riding in order to follow him, whereupon the horse struck out with his hind legs, and knocked the plaintiff down. There was no evidence to show that the horse was vicious or in the habit of kicking: but it was insisted on the part of the plaintiff, that the act of the groom in spurring him whilst the plaintiff was so near was such an act of negligence and want of proper caution as to render his master liable for the consequences.

For the defendant, it was contended that there was no evidence of negligence which could properly be submitted to the jury, the use of the spur, the ordinary instrument for the government and control of a horse, not being per se an act of impropriety.

The learned Judge left the case to the jury, who found a verdict for the plaintiff, damages 50*l.*: and leave was reserved to the defendant to move to enter a nonsuit, if the Court should be of opinion that there was no evidence upon which the jury could properly find for the plaintiff.

\*573] *\*Ballantine*, Serjt., in Easter Term last, obtained a rule nisi accordingly.

*Parry*, Serjt., and *Beasley*, now showed cause.—There was abundant evidence of negligence to warrant the conclusion the jury arrived at. The plaintiff was walking where it was proper and customary for the driver of a wagon to walk, and on his proper side of the road. The defendant and his groom were on the wrong side, and this, though not conclusive, is nevertheless a fact to be taken into consideration. The use of a spur may be very proper under some circumstances: but the question is whether it was not an act of gross impropriety and carelessness on the part of the defendant's servant to apply it at the moment when the plaintiff was in such close proximity to his horse's heels. In *Gibbons v. Pepper*, 1 Lord Raym. 38, 4 Mod. 404, 1 Salk. 637, to an action for assault and battery, the defendant pleaded that he rode upon a horse in the King's highway, and that his horse being affrighted ran away with him, so that he could not stop the horse; that there were several persons standing in the way, among whom the plaintiff stood;

and that he called to them to take care, but that, notwithstanding, the plaintiff did not go out of the way, but continued there; so that the defendant's horse ran over the plaintiff against the will of the defendant, *quæ est eadem transgressio, &c.* The plaintiff demurred: and Serjeant Darnell for the defendant argued, that, if the defendant in his justification shows that the accident was inevitable, and that the negligence of the defendant did not cause it, judgment shall be given for him. To prove which he cited *Weaver v. Ward*, Hob. 344, Moore 864, pl. 1192, 2 Rol. Abr. 548, 1 Brownl. Prec. 188. Northey, for the plaintiff, said, that, in all these cases, the \*defendant confessed [\*574 a battery, which he afterwards justified; but, in this case, he justified a battery which is no battery. Of which opinion was the whole Court; for, if I ride upon a horse, and J. S. whips the horse, so that he runs away with me, and runs over any other person, he who whipped the horse is guilty of the battery, and not me. *But, if I by spurring was the cause of such accident, then I am guilty.* In the same manner, if A. takes the hand of B., and with it strikes C., A. is the trespasser, and not B. And, per Curiam: the defendant might have given this justification in evidence, upon the general issue pleaded: and therefore judgment was given for the plaintiff. A man who uses spurs does so at his own peril. The position in which the defendant and his servant had placed themselves called for the exercise of more than ordinary care.

*Ballantine*, Serjt., and *David Keane*, in support of the rule.—The mere fact of a man's driving (or riding) on the wrong side of the road is no evidence of negligence. It was so held by this Court in *Lloyd v. Ogleby*, 5 C. B. N. S. 667 (E. C. L. R. vol. 94). Neither can a man be charged with negligence, or even with impropriety or want of caution, for using a spur. There was nothing to show that the horse in question was at all vicious or accustomed to kick, and therefore no evidence whatever from which the jury could be warranted in inferring negligence. In a very recent case in this Court, it was laid down, that, in an action of this description, the Judge is not justified in leaving the matter to the jury when the plaintiff's evidence is equally consistent with the absence as with the existence of negligence in the defendant: *Cotton v. Wood*, 8 C. B. N. S. 568 (E. C. L. R. vol. 98).<sup>(a)</sup>

\*ERLE, C. J.—I am of opinion that this rule should be discharged. I cannot say that there was not some evidence for the [\*575 jury that the defendant had been guilty of negligence. I agree that the defendant would not have been liable if the horse had without any provocation kicked out and struck the plaintiff, in the absence of a vicious disposition known to the owner. But here the horse, at the moment the spur was applied to him, was in such close proximity to the plaintiff, who was walking in his proper place, that I think the jury were well warranted in saying that the use of the spur was a culpable act. I do not at all put it on the ground that the defendant was on the wrong side of the road. I am well aware that that alone would not make him liable. But I think the groom showed such a want of care in applying the spur at the moment he did, as to render his master liable for the result.

<sup>(a)</sup> And see *Hammack v. White*, 11 C. B. N. S. (E. C. L. R. vol. 103). See also Addison on Wrongs, pp. 237, 238.

WILLIAMS, J.—I am quite of the same opinion. There was evidence that the injury sustained by the plaintiff was fairly attributable to the incautious act of the groom in applying the spur to his horse before he had got clear of the wagon and horses. My Lord was bound to leave that evidence to the jury; and I think it warranted the conclusion they arrived at. The case does not turn upon the fact of the defendant being on the wrong side. If there was negligence at all, it was upon the principle that a man has been held liable for spurring a spirited horse in the midst of a crowd, or the permitting a fettered ass to lie in a dark and narrow lane, so that a person riding by fell over it,—*Davies v. Mann*, 10 M. & W. 546.†

The rest of the Court concurring,

Rule discharged.

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\*576] \*EDWARD JAMES PURNELL, Appellant; THE WOLVERHAMPTON NEW WATERWORKS COMPANY, Respondents. *May 27.*

By the 35th section of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), it is enacted that the undertakers shall provide and keep in the pipes to be laid down by them a supply of pure and wholesome water, &c.; “and such supply shall be constantly laid on at such a pressure as will make the water reach the top story of the highest houses within the limits of the special Act, *unless it be provided by the special Act that the water to be supplied by the undertakers need not be constantly laid on under pressure:*” and by s. 42 it is enacted that “the undertakers shall at all times keep charged with water, under such pressure as aforesaid, all their pipes to which fire-plugs shall be fixed, unless prevented by frost, unusual drought, or other unavoidable cause or accident, or during necessary repairs.”

In 1845, a Company was formed for supplying water to the town of W., under an Act of Parliament (8 & 9 Vict. c. cxxxv.) which contained no provision for supplying water at high pressure. In 1850, the works of that Company were authorized to be extended by an Act (13 & 14 Vict. c. lxxiv.), the 1st section of which declared that “the Waterworks Clauses Act, 1847, with respect to the construction of the waterworks,” should be incorporated therewith.

In 1855, a new Company was formed for the better supplying with water the town of W., the suburbs thereof, and the parishes and places adjacent thereto, by an Act of 18 & 19 Vict. c. cli., by the 1st section of which it was enacted that the Waterworks Clauses Act, 1847 (amongst others), “should, except as therein otherwise provided, be incorporated with and form part of that Act;” and by the 40th section it was provided that “the water to be supplied from any pipe of the Company need not be constantly laid on under pressure.”

In 1856, the two Companies were amalgamated under an Act of 19 & 20 Vict. c. lvii., the 3d section of which contained a general provision incorporating the Waterworks Clauses Act, 1847, therewith:—

Held, that the amalgamated Company was not liable to the high pressure obligation contained in the 35th or 42d sections of the general Act.

THE following case was stated for the opinion of the Court pursuant to the 20 & 21 Vict. c. 43:—

Complaint was made by and a summons issued at the instance of Edward James Purnell, the surveyor of the borough of Wolverhampton, on behalf of the corporation of that borough, against the Wolverhampton New Waterworks Company. The hearing took place on the 7th of December, 1860.

The complainant alleged, that, after the making and passing of the Waterworks Clauses Consolidation Act, 1847, 10 & 11 Vict. c. 17, and the Wolverhampton New Waterworks Act, 1855, 18 & 19 Vict. c. cli., the defendants before and at the time of committing the offence charged, had certain main and other pipes belonging to them in the town and

parish of Wolverhampton, and had certain fire-plugs fixed thereto for the supply of water for extinguishing fires according to the provisions of the said Acts, yet that the defendants, \*on the 10th of October, 1860, did not keep charged with water the said pipes so [\*577 belonging to them, and to which fire-plugs were so fixed, but then and there wholly neglected so to do, though not prevented from so doing by frost, unusual drought, or unavoidable cause or accident, or during necessary repairs. A penalty of 10*l.* attaches to the offence.

It was proved, that, on the night in question, the Company's pipes were not kept sufficiently charged with water, and that damage by fire to the extent of 500*l.* was sustained.

On behalf of the defendants no proof was submitted that they the defendants were prevented from affording the required supply of water by either of the causes mentioned as exceptions in section 42 of the Waterworks Clauses Consolidation Act, 1847.

The complainant relied upon the provisions of the following statutes,—8 & 9 Vict. c. cxxxv. (the Wolverhampton Waterworks Act), ss. 53, 54, 55, 68, and 69: also the Waterworks Clauses Consolidation Act, 1847 (10 & 11 Vict. c. 17), particularly ss. 1, 35, 42, 43, and 85: also the Wolverhampton New Waterworks Act, 1855 (18 & 19 Vict. c. cli.), the 1st section of which enacts that “the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), and the Waterworks Clauses Consolidation Act, 1847 (10 & 11 Vict. c. 17), shall, except as herein otherwise provided, be incorporated with and form part of this Act:” also the Wolverhampton Waterworks Transfer Act, 1856 (19 & 20 Vict. c. lvii.), particularly ss. 6, 16, and 17.

By the preamble of the Waterworks Clauses Consolidation Act, 1847, it is provided “that this Act shall extend only to such waterworks as shall be authorized by any Act of Parliament hereafter to be passed which shall declare that this Act shall be incorporated therewith; [\*578 \*and all the clauses of this Act, *save so far as they shall be expressly varied or excepted by any such Act*, shall apply to the undertaking authorized thereby, and shall with the clauses of every other Act which shall be incorporated therewith form part of such Act.”

The defendants contended, and called witnesses to prove,—first, that, on the night in question, there was a sufficient supply of water in the Company's pipes to which fire-plugs were fixed,—secondly, they contended that s. 42 of the 10 & 11 Vict. c. 17 (the Waterworks Clauses Act, 1847) did not apply, because in that respect such last-mentioned Act was expressly varied and excepted by s. 40 of the 18 & 19 Vict. c. cli. (the Wolverhampton New Waterworks Act, 1855), and therefore that they were not to be required to keep the water on under the pressure stated in s. 35 of the 10 & 11 Vict. c. 17.

After hearing the evidence adduced on both sides, the magistrate found that the defendants failed in establishing their first ground, and that on the night in question there was not such a supply of water as (presuming that ss. 35 and 42 of the 10 & 11 Vict. c. 17 taken together were incorporated with the Act of the 18 & 19 Vict. c. cli.) it was incumbent upon the defendants to have in their pipes; and that the defendants were not prevented from affording such supply by either of the exceptions mentioned in s. 42 of the 10 & 11 Vict. c. 17. But he found

for the defendants on the second ground: whereupon the complainant (the appellant in this case), being dissatisfied with his decision as erroneous in point of law, demanded a case.

\*579] *Tomlinson*, for the appellant.(a)—The Waterworks \*Clauses Act, 1847, reciting that “it is expedient to comprise in one Act sundry provisions usually contained in Acts of Parliament authorizing the construction of waterworks for supplying towns with water, and that as well for avoiding the necessity of repeating such provisions in each of the several Acts relating to such undertakings, as for insuring greater uniformity in the provisions themselves,” enacts in s. 1, “that \*580] this Act shall extend only to such waterworks as shall be \*authorized by any Act of Parliament hereafter to be passed which shall declare that this Act shall be incorporated therewith; and all the clauses of this Act, save so far as they shall be expressly varied or excepted by any such Act, shall apply to the undertaking authorized thereby, so far as the same shall be applicable to such undertaking, and shall, with the clauses of every other Act which shall be incorporated therewith, form part of such Act, and be construed therewith as forming one Act.” And s. 2 enacts that “the expression ‘the special Act’ used in this Act shall be construed to mean any Act which shall be hereafter passed authorizing the construction of waterworks, and with which this Act shall be incorporated; and the word ‘prescribed’ used in this Act in reference to any matter herein stated shall be construed to refer to such matter as the same shall be prescribed or provided for in the special Act, and the sentence in which such word occurs shall be construed as if, instead of the word ‘prescribed,’ the expression ‘prescribed for that purpose in the special Act’ had been used.” The question for the decision of the Court is, whether the Company were bound to keep the water on under the pressure mentioned in the 35th section of the 10 & 11 Vict. c. 17.(b) The duty is created by s. 42, which enacts that “the

(a) The points marked for argument on the part of the appellants were as follows:—“That, by the effect of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 1, and the Wolverhampton New Waterworks Act, 1855 (18 & 19 Vict. c. cli.), s. 1, the provisions of the former Act were incorporated in the latter, save so far as expressly varied or excepted:

“That the 35th, 37th, and 42d sections of the first Act impose two obligations on the undertakers,—first, to keep their pipes at all times charged with water sufficient for domestic use, for cleansing and sanitary purposes, and for extinguishing fire, unless prevented by frost, &c.,—secondly, to keep their pipes at all times so charged with water for domestic use and for extinguishing fire, at such a pressure as to reach the tops of the highest houses:

“That the 40th section of the latter Act does not relieve the respondents from the first obligation, but only excepts and relieves them from the second obligation, of keeping their pipes charged at all times under such pressure; and that, as they failed in the performance of the first obligation, and neglected to keep their pipes sufficiently charged with water at the time of the fire, though not prevented by frost, &c., they were liable to the penalty of 10*l.*, under the 43d section of the first Act:

“And that this construction is fortified by the provisions of a further Act obtained by the respondents in *pari materia*,—the Wolverhampton Waterworks Transfer Act, 1856 (19 & 20 Vict. c. lvii.), by s. 6, transferring an older Company’s works (mentioned in the recital) to the respondents as part of their undertaking, and s. 3 incorporating the ‘Waterworks Clauses Act, 1847,’ generally, even if that unqualified incorporation has not the effect of repealing the 40th section of the Wolverhampton New Waterworks Act, 1855, as to the whole combined undertaking.”

(b) Which enacts that “the undertakers shall provide and keep in the pipes to be laid down by them a supply of pure and wholesome water, sufficient for the domestic use of all the inhabitants of the town or district within the limits of the special Act, who as hereinafter provided shall be entitled to demand a supply and shall be willing to pay water-rate for the same; and such supply shall be constantly laid on at such a pressure as will make the water reach the top

\*undertakers shall at all times keep charged with water, under such pressure as aforesaid (s. 35), all their pipes to which fire-plugs shall be fixed, unless prevented by frost, unusual drought, or other unavoidable cause or accident, or during necessary repairs, and shall allow all persons at all times to take and use such water for extinguishing fire, without making compensation for the same." By the Wolverhampton Waterworks Transfer Act, 1856, the Wolverhampton Waterworks Company, which was created by the 8 & 9 Vict. c. cxxxv., and the Wolverhampton New Waterworks Company, which was created by the 18 & 19 Vict. c. cli., were amalgamated. By s. 4 of this last-mentioned Act, the Waterworks Clauses Act, 1847, and ss. 53 and 54 of the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), are incorporated therewith: and by s. 6, the undertaking and all the works, &c., of the old Company were transferred to the new Company. The Goldthorn Hill reservoir and the main in respect of which the complaint was made were part of the works and property of the old Company. The 15th section of the last-mentioned Act enacts, that, "after the commencement of this Act, and except as is by this Act otherwise expressly provided, the new Company shall for the purposes of this Act, with respect to the waterworks, undertaking, and property to be so vested in the new Company, represent to all intents the old Company:" and s. 16 enacts, that, "after the commencement of this Act, and except as is by this Act otherwise expressly provided, the new Company shall be subject to and perform and conform to all duties, obligations, and liabilities to which the old Company immediately before the commencement of this Act were or but for this Act would be or become subject, and shall relieve and indemnify the old Company and their officers and servants, and their respective \*representatives, of and from all such duties, obligations, and liabilities, and all costs, damages, and expenses in that behalf:" and s. 17 enables the new Company to exercise all the powers of the old Company with respect to the undertaking. The 8 & 9 Vict. c. cxxxv., under which the old Company was incorporated, imposes no high-pressure obligations: but the 68th section shadows forth what may hereafter be done,—providing that, "nothing herein contained shall be deemed to exempt the said Company from the provisions, regulations, and conditions, which may be contained in any general Act for improving the condition of towns and populous districts, which may be passed in this or any future session of Parliament." Then, by the Wolverhampton Waterworks Amendment Act, 1850, 13 & 14 Vict. c. lxxiv., s. 1, it is enacted "that 'the Lands Clauses Consolidation Act, 1845,' the clauses in 'the Waterworks Clauses Act, 1847,' with respect to the construction of the waterworks, and the several provisions contained in the said recited Act (meaning by "the said recited Act," the Waterworks Clauses Act, 1847), relating to the correction of the deposited plans and books of reference, the breaking up of streets, the laying down of pipes, the supply of water, the rates for such supply, and *the protection against fire*, shall extend to this Act, and to the several matters hereby authorized, as fully and effectually as if such powers and provisions were repeated and re-enacted in this Act." The incorporation into the Amalgamation Act of the Waterworks Clauses Act, 1847, and the 53d and 54th sections of the story of the highest houses within the said limits, unless it be provided by the special Act that the water to be supplied by the undertakers need not be constantly laid on under pressure," &c.

Companies Clauses Consolidation Act, 1845, was part of the price which the legislature thought fit to impose for the privileges thereby granted: and the operation of the Act was suspended for six months (by s. 2) probably for the purpose of giving the Company time for applying the \*583] high pressure to all \*their mains and pipes. The 75th section limits the profits of the Company to 10 per cent. on the paid up capital. That the amalgamated Company are bound by all the provisions which bound each of them separately is clear from the cases of the Lancashire and Yorkshire Railway Company v. Evans, 15 Beavan 422, and Evans v. The Lancashire and Yorkshire Railway Company, 1 Ellis & B. 754 (E. C. L. R. vol. 72). In the last-mentioned case, an Act, passed in 1844, for making a railway from A., contained a clause that nothing in that Act should prevent its being subject to any general Act relating to railways subsequently passed. It also contained a clause authorizing the L. & M. Railway Company to purchase the line. The L. & M. Railway Company did purchase the line. In 1847, an Act was passed, reciting the Acts under which the L. & M. Railway and its branches were made, including the Act of 1844, and that it was expedient that the powers conferred by them should be altered. It changed the name of the Company from the L. & M. Railway Company, to the L. & Y. Railway Company, and incorporated the general Acts of 1845 (8 & 9 Vict. cc. 16, 18, 20) with that Act, so far as not inconsistent therewith. The L. & Y. Railway Company injuriously affected lands of O., after 1847, by works done under the powers of the Act of 1844. O. gave notice that he chose to have his claim settled by arbitration under the Lands Clauses Consolidation Act, 1845, and, the Company not having done anything, he formally appointed one F. arbitrator for both. It was held,—confirming the view taken by the Master of the Rolls in The Lancashire and Yorkshire Railway Company v. Evans, 15 Beavan 422,—that the Lands Clauses Consolidation Act, 1845, applied, and that O. was entitled to have the claim settled by arbitration in manner provided in s. 68.

\*584] *Powell*, for the respondents.(a)—The real question is, whether under either of the Acts of Parliament referred to, or under all of them combined, the Wolverhampton New Waterworks Company incur any liability for not keeping their mains charged at high pressure. It is conceded that no such obligation was imposed upon the old Company under the 8 & 9 Vict. c. cxxxv. It is also conceded that none arises from the Transfer Act, 19 & 20 Vict. c. lvii., unless by reason of the incorporation therewith of the Waterworks Clauses Act, 1847, 10 & 11 Vict. c. 17. The 19 & 20 Vict. c. lvii., however, incorporates only the 53d and 54th sections of the general Act. Reliance seems to be placed upon the 1st section of the Wolverhampton Waterworks Amendment

(a) The points marked for argument on the part of the respondents were as follows:—

“That the respondents were not guilty of any neglect for which they were liable to a penalty:

“That the Waterworks Clauses Act, 1847, is not so incorporated with the Wolverhampton Waterworks Transfer Act, 1856, as to make it the duty of the respondents to keep the water in their mains and other pipes at the pressure required by s. 42 of the former Act:

“That, by the express enactments of ss. 1 and 40 of the Wolverhampton New Waterworks Act, 1855, the respondents have a discretion given to them as to keeping the water in their pipes under pressure:

“And that the magistrate could not, for want of jurisdiction, have convicted the respondents.”

Act, 1850, 13 & 14 Vict. c. lxxiv., which enacts "that the Lands Clauses Consolidation Act, 1845, the clauses in the Waterworks Clauses Act, 1847, with respect to the construction of the waterworks, and the several provisions contained in *the said recited Act* relating to the correction of the deposited plans and books of reference, the breaking up of streets, the laying down of pipes, the supply of \*water, the rates for such supply, and *the protection against fire*, shall extend [\*585 to this Act and to the several matters hereby authorized, as fully and effectually as if such powers and provisions were repeated and re-enacted in this Act." The words "the said recited Act" here, however, refer to the provisions of the private Act of 8 & 9 Vict. c. cxxxv.,—as is clearly shown by the use of the same words in the 15th line of the recital. The 40th section of the Wolverhampton New Waterworks Act, 1855 (18 & 19 Vict. c. cli.), expressly exempts that Company from the obligation in question: it enacts that "the water to be supplied from any pipe of the Company need not be constantly laid on under pressure." Thus, it is clear, that no high pressure obligation was imposed upon the old Company either by their Act of incorporation (8 & 9 Vict. c. cxxxv.) or their amendment Act (13 & 14 Vict. c. lxxiv.), that the new Company were expressly exempted from it by the 40th section of the 18 & 19 Vict. c. cli., and that there is nothing in the Wolverhampton Waterworks Transfer Act, 1856 (19 & 20 Vict. c. lvii.), to create the obligation, unless it is created by implication from the Waterworks Clauses Act, 1847, being generally declared to be incorporated therewith. In *The Birkenhead Docks Trustees v. The Birkenhead Dock Company*, 23 Law J., Chan. 457, it was laid down by the Lords Justices, that a private Act of Parliament, although declared to be a public Act, cannot by any implication repeal a former private Act; and that such repeal can only operate if there be in the subsequent Act words which will operate as an express repeal of the former Act.

*Tomlinson* was heard in reply.

ERLE, C. J.—The question before the magistrate was, whether the Wolverhampton New Waterworks \*Company were bound to keep [\*586 the water in their pipes at the pressure mentioned in the 35th section of the Waterworks Clauses Act, 1847, 10 & 11 Vict. c. 17. He found that they were not: and I am of opinion that his decision was right. It appears that two Companies had been formed for the supply of water to the town of Wolverhampton,—the old Company, established under the 8 and 9 Vict. c. cxxxv., amended by the 13 and 14 Vict. c. lxxiv., and the new Company, established under the 18 & 19 Vict. c. cli. I have looked carefully through the provisions contained in the old Company's Acts; and I am clearly of opinion that they were under no obligation to keep their pipes charged with water at the pressure contended for. No such obligation is imposed upon them by anything contained in their first Act, and their second Act did not adopt that part of the general Act. Then, did the Act under which the new Company was formed impose upon them the high-pressure obligation? So far from it, the last-mentioned Act contains a clause expressly exempting them from it; for, s. 40 enacts that "the water to be supplied from any pipe of the Company need not be constantly laid on under pressure." Thus, down to the time of the passing of the 19 & 20 Vict. c. lvii., whereby all the property and rights of the old were transferred to the

new Company, neither Company was subjected to the obligation in question. Before coming to the construction of the Transfer Act, I would observe that I take it for granted the 40th section of the 18 & 19 Vict. c. cli. was an enactment which was rendered necessary by reason of local difficulties to the due carrying on of the works. The preamble of the 19 & 20 Vict. c. lvi., recites that "the two Companies are desirous, and it would be of public advantage, and it is expedient that the works of the old Company should be transferred to the new Company, and the two undertakings worked \*as one undertaking."

\*587] The 3d section declares that "the Waterworks Clauses Act, 1847, and ss. 53 and 54 of the Companies Clauses Consolidation Act, 1845, are incorporated with this Act." Now, one of the clauses of the Waterworks Clauses Act, 1847,—the 42d,—enacts that the undertakers of Companies for the supply of water "shall at all times keep charged with water, under such pressure as aforesaid, all the pipes to which fire-plugs shall be fixed, unless prevented by frost, unusual drought, or other unavoidable cause or accident, or during necessary repairs." But that is qualified by the proviso in the 1st section "that this Act shall extend only to such waterworks as shall be authorized by any Act of Parliament hereafter to be passed which shall declare that this Act shall be incorporated therewith, and all the clauses of this Act, *save so far as they shall be expressly varied or excepted by any such Act*, shall apply to the undertaking authorized thereby, so far as the same shall be applicable to such undertaking, and shall with the clauses of every other Act which shall be incorporated therewith, form part of such Act, and be construed therewith as forming one Act." The Transfer Act, 19 & 20 Vict. c. lvii., by s. 3, incorporates the Waterworks Clauses Act, 1847, without any qualification; and therefore there is much in Mr. Tomlinson's argument to afford ground for thinking that the legislature intended to impose on the Wolverhampton New Waterworks Company the duty of keeping their pipes charged with water at high pressure according to s. 42. But I also think there is much in the argument of Mr. Powell, that these are all in the nature of private Acts, and that a provision in a private Act is not to be held repealed by a subsequent private act, unless there are words which operate expressly to repeal it: and I think that the principle thus enunciated by him should guide our judgment

\*588] upon this \*occasion. The provision contained in s. 40 of the 18 & 19 Vict. c. cli. is a most important one. What is there to show that the legislature intended to repeal it? If they had meant to do so, nothing was easier than to say so. There certainly is no express repeal; and I am unable to see any intention to repeal. The effect of the Transfer Act, looking at all its provisions, seems to me to be, to annihilate the old Company, and to declare that the new one shall be the continuing Company for the supply of water to the town and neighbourhood of Wolverhampton. I gather this from the expression in the preamble, "that it is expedient that the works of the old Company should be transferred to the new Company, and the two undertakings worked as one undertaking,"—from the 6th section, which enacts, that, "after the commencement of this Act, but subject to the provisions thereof, the old Company may and shall make and execute a grant to the new Company, and the new Company may and shall accept and execute the same, according to the first of the two recited agreements,

of the works of the old Company, and the sites thereof, buildings, erections, fixed engines, fixtures, machinery, and appurtenances thereto belonging, and the fixed mains, pipes, water, and generally the whole undertaking of the old Company, with all the rights, interests, powers, authorities, and privileges whatsoever of the old Company relating thereto (except only such parts of their property as by the first of the two recited agreements are agreed to be reserved to them), and the premises so to be granted shall by virtue of this Act, and as from the commencement thereof, be vested in the new Company as part of their undertaking, and may be held and enjoyed by them accordingly,"—and from the 8th section, which enacts, that, "immediately after the commencement of this Act, the old Company shall deliver over to the new Company \*and put them in peaceable possession of the whole of [\*589 the waterworks, undertaking, and property to be so vested in the new Company." It seems to me that the new Company is the only Company now in existence, that it was an essential provision in the formation of that Company that it should be exempted from the obligation of keeping its pipes charged with water at high pressure, and that the incorporation therewith of the Waterworks Clauses Act, 1847, was not intended to operate a repeal of that express exemption. That is, in truth, the turning point of the judgment. Unless s. 3 of the Transfer Act, 19 & 20 Vict. c. lvii., creates the obligation, it does not exist. I cannot see any distinction in this respect between the works of the old and those of the new Company.

WILLIAMS, J.—I entirely agree with all that has fallen from my Lord as to the construction of the Transfer Act, 19 & 20 Vict. c. lvii. The incorporation therewith of the Waterworks Clauses Act, 1847, by s. 3 of the Transfer Act, does not operate a repeal of the 40th section of the 18 & 19 Vict. c. cli. I have nothing more to add upon that question. But, Mr. Tomlinson, in the course of his argument, urged that, independently of that incorporation of the general with the special Act, there was an obligation to keep their pipes charged at high pressure cast upon the old Company by their Amendment Act, 13 & 14 Vict. c. lxxiv., which obligation was transferred to the new Company by the 16th section of the 19 & 20 Vict. c. lvii., which enacts, that, "after the commencement of this Act, and except as is by this Act otherwise expressly provided, the new Company shall be subject to and perform and conform to all duties, obligations, and liabilities to which the old Company immediately before the commencement of this Act were or but for this Act would \*be or become subject, and shall relieve and [\*590 indemnify the old Company and their officers and servants, and their respective representatives, of and from all such duties, obligations, and liabilities, and all costs, damages, and expenses in that behalf." No doubt that section does cast upon the new Company all the obligations and duties of the old Company. But I think Mr. Tomlinson has failed to show that any such liability as is suggested existed with respect to the old Company. The argument was founded upon this, that the words "the said recited Act" in the enacting part of the 1st section of the 13 & 14 Vict. c. lxxiv. referred to the Waterworks Clauses Act, 1847, and therefore incorporated in the special Act the provisions of the general Act as to protection against fire. At first, I was inclined to assume with Mr. Tomlinson that it did so mean: and, if that had been

correct, the argument would have been unanswerable. But, upon consideration, I am of opinion that that is not the true reading of the statute. Why should the Waterworks Clauses Act, 1847, be "the said recited Act," rather than the Lands Clauses Consolidation Act, 1845? Both those statutes are *mentioned*; but, in strictness, there is no other recited Act than the 8 & 9 Vict. c. cxxxv.; and, when that Act is looked at, it will be found that it alone contains the provisions referred to. Throughout the Act, viz., in the earlier part of s. 1, and again in ss. 10, 14, 17, and 20, the same words "the said recited Act" refer to the private Act, 8 & 9 Vict. c. cxxxv. We are therefore driven back to the construction of the 3d section of the 19 & 20 Vict. c. lvii., which for the reasons so fully given by my Lord, and in which I entirely concur, leaves the exempting clause contained in the Wolverhampton New Waterworks Company's Act, 18 & 19 Vict. c. cli., in full force, and so entitles the respondents to a decision in their favour.

\*591] \*WILLES, J.—I entirely agree with what has fallen from my Lord and my Brother Williams.

BYLES, J.—I am of the same opinion: and I must confess I have been much influenced by the case of *The Trustees of the Birkenhead Docks v. The Birkenhead Dock Company*, 23 Law J. Chan. 457, where Lord Justice Turner, a very high authority, lays down the rule to be this,—  
 "It is a rule of law that one private Act of Parliament cannot repeal another, except by express enactment." If the Waterworks Clauses Act, 1847, were so incorporated with the Wolverhampton Waterworks Transfer Act, 1856, as to override the 18 & 19 Vict. c. cli., it could only at the utmost impliedly repeal the 40th section of the last-mentioned Act: and the case referred to is a distinct authority to show that there can be no repeal except by express enactment. I would further suggest that any other construction would lead to great inconvenience; for, many questions might arise as to whether the works were old works or new, or partly old and partly new: and it is important that the same rule of construction should be applied as to the whole of the town and neighbourhood. The result is, that the decision of the magistrate will be affirmed.

Decision affirmed.

\*592] \*GILDING v. EYRE and Another. July 8.

The declaration stated that the defendants (the one, A., acting as attorney for B., the other) recovered a judgment against the plaintiff for 30*l.* 7*s.* 4*d.*, that the plaintiff paid and satisfied to B. the debt recovered by such judgment except the sum of 15*s.* 8*d.*, and that the defendants sued out a ca. sa. upon the judgment, and *wrongfully and maliciously, and without any reasonable or probable cause*, endorsed the said writ with directions to levy 5*l.* 14*s.* 8*d.*, and interest, and 1*l.* 7*s.* for the costs of execution; that the plaintiff tendered and offered to pay to the defendants 3*l.* 8*s.*, which was sufficient to pay and discharge all that was recoverable against the plaintiff upon the judgment and writ, together with the costs of the writ of execution and all other legal and incidental expenses; and that the defendants *wrongfully and maliciously, and without any reasonable or probable cause*, procured the sheriff to arrest the plaintiff, and detain him until he paid 7*l.* 6*s.* 9*d.*, whereas 3*l.* 8*s.* and no more was due and owing from and recoverable against the plaintiff upon the said judgment:—

Held, on demurrer, that the declaration disclosed a good cause of action, and that it was not necessary for the plaintiff to allege that he had obtained his discharge by order of the Court or a Judge, so as to show that the proceedings had terminated in his favour.

THE declaration stated that the defendants, at the time of the com-

mitting of the grievances thereafter mentioned, were attorneys, and carried on business as such as copartners, and the defendant G. L. P. Eyre, by the other defendant as his attorney, commenced and prosecuted an action against the now plaintiff in the Court of Queen's Bench at Westminster, for recovery of a certain debt alleged to be due from the now plaintiff to the said G. L. P. Eyre; and such proceedings were had in the said action that the said defendant on the 16th of November, 1859, by the consideration and judgment of the said Court, recovered against the now plaintiff a certain debt or sum of 30*l.* 7*s.* 4*d.*; and the now plaintiff afterwards, and before the committing of the grievance thereafter next mentioned, paid and satisfied to the said G. L. P. Eyre all the amount of the said debt so recovered by the said judgment, except the sum of 15*s.* 8*d.*: That the defendants afterwards, on the 11th of December, 1860, caused and procured a certain writ of *capias ad satisfaciendum* to be issued out of the said Court of Queen's Bench in the said action upon the said judgment, directed to the sheriff of Middlesex, commanding the said sheriff to take the plaintiff and him safely keep to satisfy the defendant the said debt of 30*l.* 7*s.* 4*d.*, together with interest upon the sum of 5*l.* 14*s.* 8*d.*, at the rate of 4*l.* per cent. per annum from \*the said 16th of November, 1859, *and wrongfully* [\*593 *and maliciously, and without any reasonable or probable cause,* endorsed the said writ with directions to levy more than the said sum of 15*s.* 8*d.*, the part of the said debt of 30*l.* 7*s.* 4*d.* so remaining due as aforesaid, that is to say, with directions to levy 5*l.* 14*s.* 8*d.*, and interest thereon at 4*l.* per cent. per annum from the 16th of November, 1859, and also 1*l.* 7*s.* for the costs of execution, besides officer's fees and all other legal and incidental expenses, and delivered the said writ so endorsed to the said sheriff, to be executed in due form of law: That afterwards, and before his arrest thereafter mentioned, he, the plaintiff, tendered and offered to the defendants, and offered to pay to the defendants, the sum of 3*l.* 8*s.*, and which said sum of 3*l.* 8*s.* was sufficient to pay and discharge all that was recoverable against the plaintiff upon the said judgment and writ, together with the costs of the said writ of execution and all other legal and incidental expenses: Yet, the defendants *wrongfully and maliciously, and without any reasonable or probable cause,* caused and procured the said sheriff, under the said writ, and within his bailiwick, to take and arrest the plaintiff by his body, and the said sheriff accordingly took the plaintiff by his body, and imprisoned him, and the plaintiff was imprisoned and detained in prison under the said writ to satisfy the defendant the moneys so endorsed on the said writ and thereby directed to be levied, for a long space of time, and until he the plaintiff was forced and compelled by the defendants, in order to procure his discharge from the said imprisonment, to pay to the defendants the sum of, to wit, 7*l.* 6*s.* 9*d.*, whereas, at the several times of the said suing out, endorsing, delivering, taking, imprisoning, and detaining in prison, a much lesser sum than the said sum of 7*l.* 6*s.* 9*d.*, to wit, the sum of 3*l.* 8*s.* and no more, was due and owing from the \*plaintiff and recoverable against him upon the said judgment [\*594 and writ, and the plaintiff was always from the time of making the said tender, at the time of his said arrest, and during all the time of his detention, ready to pay the defendants the said sum of 3*l.* 8*s.*; and the plaintiff, by reason of the premises, was necessarily put to and

incurred divers costs and expenses during his said detention, for officer's fees for searching for other executions, and for other expenses, in obtaining his discharge from the said imprisonment; and the plaintiff was also during all the time of his detention in prison hindered and prevented from attending to his business, and was injured in his credit and circumstances.

The defendants demurred to this count, the ground of demurrer alleged in the margin being, "that the declaration does not show that the malicious proceeding terminated in the now plaintiff's favour: but, on the contrary, it appears thereby that he actually paid the sum endorsed on the ca. sa."

The plaintiff joined in demurrer.

*J. A. Russell* (with whom was *Bovill*, Q. C.), in support of the demurrer.<sup>(a)</sup>—The declaration is bad for \*not showing that the  
\*595] proceedings complained of terminated in favour of the now plaintiff. It appears that the plaintiff, in order to get discharged from custody, paid the sum endorsed upon the writ, and consequently the termination of the proceedings was in favour of the now defendants. If he was entitled to his discharge on payment of the smaller sum, he might have obtained a Judge's order for that purpose: but he has not thought fit to adopt that course. The matter was very much discussed in a recent case in this Court, *Steward v. Gromett*, 7 C. B. N. S. 191 (E. C. L. R. vol. 97). The ordinary rule was held not to apply there, because the proceeding was *ex parte*, and the plaintiff could not have been heard to controvert the facts alleged against him before the magistrate. The reason of the rule is given by Lord Tenterden in *Wilkinson v. Howell*, M. & M. 495, thus,—“The general rule is, that a party cannot sue for a malicious arrest or prosecution, without showing in his declaration how the proceeding complained of was terminated. That is the form in which the rule is generally expressed; and I think that rule involves this principle, that the termination must be such as to furnish *prima facie* evidence that the action was without foundation.” In *Whitworth v. Hall*, 2 B. & Ad. 695, it was held, that in an action for maliciously suing out a commission of bankrupt, it must be averred and proved that the commission was superseded before the commencement of the action: and, if this fact be not proved, the plaintiff ought to be nonsuited, though it was not averred in the declaration, and though the defendant, who might have demurred for the omission, had not done so. *Littledale, J.*, in that case, says: “There is no distinction between an action for a  
\*596] \*malicious prosecution by indictment or for a malicious arrest, and one for maliciously suing out a commission of bankrupt. In all of them it is necessary to show that the original proceeding which formed

(a) The points marked for argument on the part of the defendants were,—

“1. That the first count is defective for omitting to show that the malicious proceedings complained of terminated in the plaintiff's favour:

“2. That, after payment under compulsion of legal process of the money to recover which the writ of *capias ad satisfaciendum* in the former action was issued and endorsed, the now plaintiff is not entitled to maintain this action so long as the process complained of remains in force:

“3. That the now plaintiff's proper remedy would have been to have applied in the former action to set aside the writ and execution, and for a rule or order for the now plaintiff's discharge from custody, or for the repayment of the alleged excess; and that, having failed to take that course, the former proceedings are conclusive as to the existence of probable cause.”

the alleged ground of the action is at an end." And Parke, J., says: "It seems to be involved in the proposition that the commission was sued out without reasonable and probable cause, that such commission must be superseded before the action be commenced, for, the very existence of the commission would be some evidence of probable cause." [WILLIAMS, J.—It surely cannot be necessary to aver the successful termination of the suit, in an action for a misuse of the process of the Court.] In *Jenings v. Florence*, 2 C. B. N. S. 467 (E. C. L. R. vol. 89), the party obtained his discharge on payment of the lesser amount. In *De Medina v. Grove*, 10 Q. B. 152, 172, it was held that no action lies against an execution-creditor or his attorney for issuing a fi. fa. endorsed to levy the whole sum recovered by a judgment, which, to the knowledge of both, has been partly satisfied by payments, unless malice and want of probable cause be alleged in the declaration, and proved. Wilde, C. J., there threw out a suggestion (in the Exchequer Chamber), that "the plaintiff might have applied, if the state of facts justified the application, either, before the arrest, to have satisfaction entered up, or, after the arrest, to be discharged. It might therefore be a question whether, even with all proper averments on the record, the proper remedy would be by action: for, it might be contended that what is complained of by the plaintiff was mere irregularity." But the Court of Queen's Bench, in the subsequent case of *Churchill v. Siggers*, 3 Ellis & B. 929 (E. C. L. R. vol. 77), dissented from that doctrine, and held, that, if the declaration contained an averment of malice and want of reasonable or probable cause, there was no difference \*between [\*597 an arrest for an excessive sum on mesne process and such an arrest in execution. In *Churchill v. Siggers*, as in *Jenings v. Florence*, it appeared that the proceeding had terminated in favour of the plaintiff. The last-mentioned case seems to have afforded the model for the declaration here: but there the declaration contains an averment which is wanting here, viz. that the now plaintiff was discharged on payment of the lesser sum. There can be no valid reason why the ordinary rule which prevails in actions for malicious arrest or malicious prosecution should not apply here. [BYLES, J.—According to your argument, the more the party is damnified the less he has a remedy.]

*Tompson Chitty*, contrà.(a)—The declaration is \*sufficient [\*598 without the averment suggested. The reason why in an ordi-

(a) The points marked for argument on the part of the plaintiff were as follows:—

"That the defendants by demurring, admit the fact alleged in the first count in the declaration to be true; that the wrongful acts complained of were the acts of the defendants themselves, and that it was therefore not necessary to allege that the proceedings terminated in the plaintiff's favour; that the acts complained of were not inadvertent, but were *wrongful, wilful, malicious, and without reasonable or probable cause*, and it must be taken as a fact that the sum tendered by the plaintiff was to the knowledge of the defendants all that was due to and properly recoverable by the defendant G. L. P. Eyre; that the defendants by their *wrongful, wilful, malicious act*, knowing that such sum, to wit, 15s. 8d. only, was due, by the endorsement on the writ, and caption and imprisonment of the plaintiff, extorted from him the larger amount of 7l. 6s. 9d., and caused the plaintiff the special damage alleged in the first count of the declaration; that, the proceedings of the defendants being wilful and malicious, and without reasonable or probable cause, it was not necessary that the plaintiff, in order to obtain his liberation from the said imprisonment, or to enable him to maintain this action, should have applied to set aside the said execution, or should have applied to the Court or a Judge to discharge him out of custody on payment of the sum really due and recoverable from him; but that he was justified in paying the full amount sought improperly to be extorted from him, in order immediately to regain his liberty."

nary action for malicious prosecution it is necessary to show that the proceeding complained of had terminated in favour of the party complaining, is, that it would be inconvenient to have two actions involving the same issue going on at the same time. Here, there was no proceeding which was to be the subject of inquiry. An application to a Judge would only enable the party to obtain his discharge after the injury was done. The case is hardly to be distinguished from that of *Stewart v. Gromett*, 7 C. B. N. S. 191 (E. C. L. R. vol. 97). [WILLIAMS, J.—There is a distinction between a case where the process of the Court is abused by turning it to a purpose for which it was never intended, and a case like the present, where the *ca. sa.* is regular.] *De Medina v. Grove*, 10 Q. B. 152 (E. C. L. R. vol. 59), was the first of this class of cases in modern times. There, the plaintiff had been taken on a *ca. sa.* for more than was due upon the judgment; and the declaration charged that the defendants *wrongfully and injuriously* caused the writ to be endorsed with the larger sum, and *wrongfully and injuriously* delivered it so endorsed to the sheriff, to be executed, &c., but did not allege it to have been done *maliciously*: and it was held that without the averment and proof of malice and want of probable cause the action could not be sustained. Lord Denman, in delivering the judgment of the Court below, says: “*Primâ facie*, the plaintiff has a right to take out execution upon an unsatisfied judgment for the amount of the debt or damages recovered. If the judgment has been satisfied in part, application may \*599] be made to the Court of \*Chancery, or to the equitable jurisdiction of the Court of common law, to restrain the plaintiff from taking out execution, or rather from endorsing and executing his process, for more than actually is due: but great inconsistency and inconvenience might arise if the merits or force and effect of a judgment remaining wholly unreversed, and good upon the face of it, could be wholly or partially questioned in a collateral action such as this, in which the gist of the action, as it appears by the declaration, is, the levying for the whole amount after it had been reduced by part payments. *If malice and want of reasonable and probable cause had been alleged, they would have formed the gist of the action*; and the part payment would only have been a circumstance, which alone would not have entitled the plaintiff to maintain an action.” *Churchill v. Siggers*, 3 Ellis & B. 929 (E. C. L. R. vol. 77), is precisely like this case. Lord Campbell’s judgment exactly meets the circumstances here. “To put into force the process of the law maliciously and without any reasonable or probable cause,” he says, “is wrongful; and if thereby another is prejudiced in property or person, there is that conjunction of injury and loss which is the foundation of an action on the case. Process of execution on a judgment seeking to obtain satisfaction for the sum recovered, is *primâ facie* lawful; and the creditor cannot be rendered liable to an action, the debtor merely alleging and proving that the judgment had been partly satisfied, and that execution was sued out for a larger sum than remained due upon the judgment. Without malice and the want of probable cause, the only remedy for the judgment-debtor is, to apply to the Court or a Judge that he may be discharged, and that satisfaction may be entered up on payment of the balance justly due. But it would not be creditable to our jurisprudence if the debtor had no remedy by

\*action where his person or his goods have been taken in execution for a larger sum than remained due on the judgment, this [\*600 having been done by the creditor maliciously and without reasonable or probable cause; i. e., the creditor well knowing that the sum for which execution is sued out is excessive, and his motive being to oppress and injure the debtor." And, in a subsequent part of the judgment, his Lordship says: "There appears to be no authority amounting to an express decision that such an action is maintainable: but we think there is a strong indication by the majority of the Judges who took part in the decision of *Wentworth v. Bullen*, 9 B. & C. 840 (E. C. L. R. vol. 17), *Saxon v. Castle*, 6 Ad. & E. 652 (E. C. L. R. vol. 33), 1 N. & P. 661 (E. C. L. R. vol. 36), and *De Medina v. Grove*, 10 Q. B. 152, 172 (E. C. L. R. vol. 59), that, with an allegation of malice and want of reasonable or probable cause, such an action is maintainable, although not without that allegation." In *Gough v. Cribb*, 11 M. & W. 497,† there was no averment of malice." In *Tebbutt v. Holt*, 1 Car. & K. 280 (E. C. L. R. vol. 47), the action was held to be maintainable on proof of malice and want of probable cause. And in *Lewis v. Morris*, 2 C. & M. 712,† 4 Tyrwh. 907, malice was negatived. But in neither of these cases was it held to be necessary to show that the proceedings had come to an end. In *Crozer v. Pilling*, 4 B. & C. 26 (E. C. L. R. vol. 10), 6 D. & R. 129 (E. C. L. R. vol. 16), case was held to lie against a plaintiff for having maliciously refused a tender of the debt and costs by a debtor in custody under a ca. sa., the writ remaining. In *Moore v. Gardner*, 16 M. & W. 595,† the plaintiff was in custody under an attachment from the Court of Chancery for non-payment of costs to the plaintiff in a suit in equity: after the costs were paid, the solicitor of the plaintiff in equity refused to give an order to discharge the plaintiff, saying, "Let him go to the Court to purge his contempt:" the Judge in equity discharged him, on motion: and it was held that no action was \*maintainable against the solicitor for refusing to give the order [\*601 to the sheriff, and thereby prolonging the plaintiff's imprisonment, *except on proof of express malice*,—assuming, that, if malice had been alleged and proved, the action would have lain. *Hounsfield v. Drury*, 11 Ad. & E. 98 (E. C. L. R. vol. 39), is to the same effect as *Crozer v. Pilling*. In *Scheibel v. Fairbairn*, 1 Bos. & P. 388, it was assumed that an action would lie against a party suing out a writ, if he neglected to countermand it after payment of the debt, malice being averred. [WILLIAMS, J.—In the ordinary case of an action for malicious prosecution, the omission to aver that the suit or prosecution is at an end, is ground of nonsuit or arrest of judgment: *Whitworth v. Hall*, 2 B. & Ad. 695 (E. C. L. R. vol. 22). In *Wilkinson v. Howel*, M. & M. 495 (E. C. L. R. vol. 22), the suit was terminated by a stet processus: and, upon that case being cited in *Norrish v. Richards*, 3 Ad. & E. 733 (E. C. L. R. vol. 30), 5 N. & M. 269 (E. C. L. R. vol. 36), as an authority to show, that, to support an action for a malicious arrest, it must appear from the mode in which the first suit terminated that it had no foundation, Patteson, J., observed: "You cannot contend that that may not be shown by other evidence: there could else be no action for a malicious arrest, where the cause had been removed. A stet processus, by which the suit was ended in *Wilkinson v. Howel*, would not only be no evidence that the suit was without foundation, but would be *primâ facie* evidence

the other way, the suit being thus concluded by consent of the parties." In *Haddrick v. Heslop*, 12 Q. B. 267 (E. C. L. R. vol. 64), it was held that the acquittal of the party was not put in issue by "not guilty." [WILLIAMS, J.—It must be allowed that that case and *Watkins v. Lee*, 5 M. & W. 270,† 7 Dowl. P. C. 498, are somewhat inconsistent with *Whitworth v. Hall*, 2 B. & Ad. 695 (E. C. L. R. vol. 22), and *Atkinson v. Raleigh*, 3 Q. B. 79 (E. C. L. R. vol. 43), 2 Gale & D. 611, because \*602] they held that the failure to prove that the \*prosecution had terminated in favour of the plaintiff was ground of nonsuit. They put it upon this principle, that the continuance of the prosecution or proceeding was *prima facie* proof of the existence of probable cause. Not guilty puts the whole in issue.] Not guilty does not put in issue the termination of the malicious proceeding. The demurrer here admits that everything had been terminated in the defendant's favour, and that what was done was done maliciously. Parke, B., in *Wentworth v. Bullen*, 9 B. & C. 840, 848 (E. C. L. R. vol. 17), says: "I am satisfied that an action for issuing execution for too much will lie." He goes on: "It is said that the plaintiff sustained no damage, for he was lawfully imprisoned, and imprisonment was the gravamen: but the condition of a prisoner is materially different when he is charged in execution for a large and for a small sum; in the latter case, his friends may make efforts to relieve him, which they would not in the former. An application to the equitable jurisdiction of the Court would fall short of doing complete justice, for it gives no damages. Such an application is the only remedy where the right is an equitable one, as in the case of bonds where execution is issued for too much; but, if an agreement has been made and broken, an action must on general principles lie; and it is no answer to say that there is another remedy, still less a defective remedy, for the wrong."

*Russell* was heard in reply.

*Cur. adv. vult.*

WILLES, J.—The judgment I am about to deliver is that of my Brothers Williams, Byles, and Keating. I was not present at the argument: but, as they are engaged in the House of Lords, I read their judgment for them.

\*603] The declaration in this case stated that the \*defendants had recovered a judgment against the plaintiff, who paid the amount thereof, with the exception of 15s. 8d.; that the defendants afterwards issued a writ of ca. sa. for the whole amount of the debt, and *wrongfully and maliciously, and without any reasonable or probable cause*, endorsed the said writ with directions to levy a larger amount than was due, and delivered the same to the sheriff to be executed; that afterwards, and before the arrest complained of, the plaintiff tendered to the defendants the whole amount really due, with costs, and which at all times afterwards he was ready to pay; yet that the defendants, *wrongfully and maliciously, and without any reasonable or probable cause*, procured the arrest and imprisonment of the plaintiff, who was forced, in order to obtain his release, to pay to the defendants the larger amount so endorsed, and by means thereof damage had accrued to the plaintiff. To this declaration the defendants demurred; and the question is whether it discloses any cause of action.

Since the cases of *Churchill v. Siggers*, 3 Ellis & B. 929 (E. C. L. R.

vol. 77), *Jenings v. Florence*, 2 C. B. N. S. 467 (E. C. L. R. vol. 89), and other similar cases, it could not be denied that the endorsement of a ca. sa. for a larger amount than due, and an arrest under it, if malicious and without any reasonable or probable cause, would be actionable; nor did the learned counsel for the defendants for a moment dispute it: but he contended that the plaintiff in the present case, before bringing his action, should have obtained his discharge from custody by an order of the Court or a Judge, as in the cases referred to; and that his omission to show such discharge on the face of his declaration rendered it bad, as being inconsistent with a want of reasonable and probable cause, and as showing that the former proceedings had not terminated in his, the plaintiff's, favour.

\*We are, however, of opinion that the declaration in this case [\*604 discloses a good cause of action.

It is a rule of law, that no one shall be allowed to allege of a still depending suit that it is unjust. This can only be decided by a judicial determination, or other final event of the suit in the regular course of it. That is the reason given in the cases which established the doctrine, that, in actions for a malicious arrest or prosecution, or the like, it is requisite to state in the declaration the determination of the former suit in favour of the plaintiff, because the want of probable cause cannot otherwise be properly alleged: see *Waterer v. Freeman*, Hob. 267; *Parker v. Langley*, 10 Mod. 209, 210; *Whitworth v. Hall*, 2 B. & Ad. 695, 698 (E. C. L. R. vol. 22), per Parke, B. But, in the present case, the complaint is not that any undetermined proceeding was unjustly instituted. The alleged cause of action is, that the defendant has maliciously employed the process of the Court in a terminated suit, in having by means of a regular writ of execution extorted money which he knew had been already paid and was no longer due on the judgment.

The whole force of the argument so ably put forward on the part of the defendants rests upon the assumption that the order of a Court or Judge for the plaintiff's discharge from custody was the only mode of legally determining the former proceedings, by ascertaining the illegality of the arrest complained of: whereas, in truth, that illegality altogether depends on the amount for which the arrest was made being greater than the sum due,—a fact which could only be decided conclusively between the parties by the verdict of a jury.

The Court, on an application for a discharge from custody, will no doubt look at affidavits of the facts, for the purpose of informing its conscience in the \*exercise of its equitable jurisdiction: but the Court, by its order either discharging or refusing to discharge a [\*605 party from custody, does not necessarily decide or affect to decide any disputed question of fact, so as to preclude the parties from having that fact subsequently ascertained by the verdict of a jury. No conflict of decision, therefore, could occur in the present case; nor could the want of probable cause be affected by an order not necessarily decisive of any question involved in it.

The plaintiff in this action, upon the facts stated in his declaration, might doubtless have obtained his discharge from custody by an order of the Court; but he was not bound to do so; and his yielding (in order to obtain his liberty) to the extortion practised upon him, not by the act

of the Court, but by the act of the defendant, cannot deprive him of his legal remedy for the wrong he has sustained.

We think, therefore, the plaintiff is entitled to judgment.

Judgment for the plaintiff.

**\*606] \*HARDCASTLE and Another v. DENNISON. June 4.**

The testator devised certain copyholds of the manor of Knaresborough to his nephew John J. for life, remainder to James J., son of John J., and the heirs male of his body: "provided, always, that, in case the said James J. shall happen to depart this life without leaving issue male of his body lawfully begotten, him surviving, then I give and devise all my said real estate from and after the decease of the said John J. or James J., which shall last happen, unto my nephew George J., his heirs and assigns for ever:—"

Held, that, in the absence of a custom to entail within the manor of Knaresborough,—the existence of which the evidence set out in the case was found to be insufficient to establish,—the testator's nephew John J. took under the above devise an estate for life, and his grandnephew James J. a fee simple conditional, and that the devise over to the testator's nephew George J. was a good executory devise.

THIS was an action of ejectment brought to recover certain lands in the parishes of Knaresborough and Farnham, in the county of York, alleged by the claimants to be copyhold.

The cause came on to be tried at the Yorkshire Spring Assizes, 1859, when it was ordered, by consent, that it should be referred to an arbitrator to determine whether any and what portion of the lands sought to be recovered was of copyhold tenure, and whether any and what portion was of freehold tenure; and that, in the event of his finding part to be freehold and part copyhold, he should settle a special case for the opinion of the Court as to the copyhold portion; and that he should state in such special case the evidence adduced as to any alleged custom of entailing within the manor of which the lands are claimed as copyhold; and that the determination of the existence of such custom should be left to the Court, who should have power to draw inferences of fact; and that the verdict should be entered according to the direction of the Court.

The arbitrator determined that the lands sought to be recovered were partly freehold and partly copyhold, and by his award ascertained the respective portions of each. As to the freehold lands, no question arose, and the verdict as to these was to be for the defendant. As to the copyhold, the arbitrator, in pursuance of the above order, stated the following case:—

The premises in question, which are copyhold of and in the manor or soke of Knaresborough, were purchased by George Jackson, of Dunkes-  
**\*607]** wick, in the year \*1800, and were conveyed to him in the usual way by surrender and admittance. George Jackson, on being admitted, surrendered the premises to the use of his will, which, being duly executed and attested to pass real estate, and bearing date the 6th of May, 1814, contained the following devise: "I give and devise all my messuages, lands, tenements, and hereditaments, and real estate, whatsoever, and wheresoever situate, unto my nephew, John Jackson, and his assigns, for and during the term of his natural life, without impeachment of waste; and, from and after his decease, I give and

devise the same unto my great-nephew, James Jackson, son of the said John Jackson, and the heirs male of the body of the said James Jackson lawfully issuing, for ever: Provided always, that, in case the said James Jackson shall happen to depart this life without leaving issue male of his body lawfully begotten, him surviving, then I give and devise all my said real estate, from and after the decease of the said John Jackson or James Jackson, which shall last happen, unto my nephew, George Jackson, son of my late brother Samuel Jackson, his heirs and assigns for ever."

In November, 1815, the testator, George Jackson, of Dunkeswick, died seised of the premises in question, without having altered his will: and, on the 11th of September, 1816, John Jackson, the tenant for life named in that will, was admitted to the premises in question, as tenant for life under the will, and died in the year 1830.

On the 7th of April, 1836, James Jackson, the testator's great-nephew mentioned in the will, was admitted to the premises. This admittance recites the death of George Jackson, of Dunkeswick, seised of the premises in question, having first surrendered them to the use of his will, and that, by his will, dated the 6th of May, 1814, he devised the same unto his nephew, John Jackson, and his assigns, for and during the \*term of his natural life, and, from and after his decease, unto the testator's great-nephew, James Jackson, son of the said John [\*608 Jackson, and the heirs male of the body of the said James Jackson lawfully issuing, for ever; and the habendum of the admittance is "To hold to the said James Jackson, and the heirs male of his body lawfully issuing, for ever, according to the purport, true intent, and meaning of the said will, and according to the custom of the said manor."

The said James Jackson was the eldest son and heir at law, according to the custom of the manor, of the said John Jackson.

On the 12th of July, 1836, the said James Jackson, by a surrender, in which he was described as the eldest son and heir at law of the said John Jackson, and which is expressed to be for the purpose of settling the hereditaments and premises described (being those in question) to the uses and for the ends, intents, and purposes thereafter declared, surrendered the same to the use and behoof of the said James Jackson during the term of his natural life, without impeachment of or for any manner of waste; and from and immediately after his decease, to the use of such person and persons, and for such estate and estates, and in such manner and form, and for such intents and purposes, and under and subject to such powers, provisoes, and declarations, as the said James Jackson should by writing of surrender direct, limit, appoint, or surrender the same, and, in default of surrender, then as he should by his last will and testament in writing, or any codicil thereto, to be signed and published by him in the presence of and to be attested by two or more credible witnesses, give or devise the same; and, in default of such direction, limitation, or appointment, surrender, and devise, and in the mean time until any such should be made or take effect, and as to so much \*of the said premises to which any such direction, limita- [\*609 tion, appointment, surrender, or devise, if incomplete, should not extend, To the use and behoof of the said James Jackson, his heirs and assigns, for ever, by the rents and services therefore due and of right accustomed, according to the custom of the said manor. The above

surrender was entered on the Court rolls on the following day, viz., the 13th of July, 1836.

In September, 1857, the said James Jackson died, without ever having had any issue of his body.

In August, 1822, George Jackson (of Burton Leonard), the testator's nephew mentioned in the aforesaid will, died, having first made his will, duly executed and attested to pass real estate; and thereby devised to the claimant, William Hardcastle, and two others, since deceased, their heirs, executors, administrators, and assigns, all his real and personal estate, of what nature, tenure, or kind soever the same might be, upon certain trusts.

The claimant, Samuel Jackson, is the heir at law and heir according to the custom of the manor of George Jackson, of Burton Leonard; and, in October, 1857, was, as such heir, admitted to the said copyhold premises.

On the 26th of January, 1859, the claimant William Hardcastle was, as surviving devisee under the will of George Jackson, of Burton Leonard, also admitted to the same premises.

The following evidence was adduced as to the alleged custom of entailing within the manor or soke of Knaresborough:—

The manor or soke of Knaresborough is a distinct manor from that of the forest of Knaresborough; but both have the same Court rolls and the same steward and under-steward. Courts are held every three weeks \*610] for the forest and liberty of Knaresborough; at \*which Courts all admittances, both for the forest and manor, are made: but the entries on the Court rolls have distinct headings of "Forest" or "Manor," as the case may be.

The style of the Court is, "The Court of Our Sovereign Lady Victoria held for her Forest and Liberty of Knaresborough within her Castle there."

The several officers for the townships within the manor and forest are appointed at the same Court leet and Court baron, which is held for the forest and liberty of Knaresborough. The officers are sworn to execute their respective offices according to the custom of the forest and liberty of Knaresborough. Separate juries are sworn at the two principal Courts, at Easter and Michaelmas, for the forest and for the manor; and each jury makes presentments, which are entered on the rolls; but no presentments are made by such juries of either surrenders or admittances.

The manor or soke of Knaresborough comprises parts of the townships of Knaresborough, Scriven-with-Tentergate, and Ferensby.

The liberty of Knaresborough comprises the whole of the manor or soke and six other townships.

The forest of Knaresborough comprises eleven townships, none of which are included either in the manor or liberty.

The forest, manor, and liberty are all within the honor of Knaresborough, which is parcel of the duchy of Lancaster.

In the years 1770 and 1774, two Acts of Parliament were passed for enclosing the wastes of the said forest, which Acts were to be referred to, if necessary, as part of this case. The forest and manor adjoin each other, and, previously to and at the time of the passing of the said Acts, some of the copyholders of the manor claimed rights of common over

the said wastes, and numerous \*allotments were awarded under the said Acts in respect of such claims. [\*611

The only customary entered on the rolls is that for the forest, a copy of which, contained in the book marked A., was to be taken as part of this case. This customary is also entered in the office of the duchy of Lancaster.(a)

(a) These alleged customs were as follows:—

“Whereas, before this time, upon petition made to the Chancellor and Council of this honourable Court,† by the Queen’s Majesty’s copyhold or customary tenants of Her Majesty’s manor or lordship of Knaresbrough, being parcel of her duchy of Lancaster, in the county of York, that they might have a commission for the due examination and trying out of certain ancient customs within Her Highness’s forest of Knaresbrough, parcel of her said manor or lordship; whereupon the said Chancellor and Council, well considering their requests, thinking that by the examination and trying out of the same, it might be as well beneficial to the Queen’s Majesty as also to the said tenants, granted unto them a commission under the seal of this honourable Court, bearing date the 15th day of June, in the 1st year of the reign of our said Sovereign Lady Elizabeth, &c., and the same directed to the Right Hon. Henry, Earl of Cumberland, Sir William Ingilby, Knt., and others, authorizing them, or ——— of them, by virtue thereof, to inquire by the oaths of twelve honest and indifferent persons dwelling within the said forest of Knaresbrough, of the said ancient custom and things which of old time had been used within the same, as by the same commission more at large appeareth: And thereupon, the said commissioners travelled therein accordingly, and did inquire of the said customs by the oaths of the said twelve persons dwelling within the said forest, and the presentment or verdict of them did put in writing, and the same have certified unto this Court:

“Whereupon the said Chancellor and Council, upon further suit and petition made unto them by the said tenants that they would establish and make some final order and direction in the premises, have thoroughly perused and deliberately considered the same presentment and every part thereof, as well for the commodity of the Queen’s Highness, as also for the said tenants:

“And forasmuch as it appeareth thereby that divers ancient customs within the said forest, which might be not only to the benefit of the Queen’s Majesty, her heirs and successors, but also of the said tenants there, have in times past been had and used within the same forest,—the said Chancellor and Council of this Court have therefore well considered the same, and for a final order therein, and ease and quietness of the said tenants, and for avoiding of troubles that hereafter might ensue, have, in this said 24th day of May, in the said 5th year of the said Queen’s Majesty’s reign, by the assent of the said tenants, ordered and decreed in manner and form following, that is to say,—

“1. That, after the death of every customary tenant dying seised of any messuage parcel of the said lordship or manor, whether there be any lands lying to it or not, that the officer there for the time being shall seize to the use of the Queen’s Majesty, her heirs and successors, his best beast, that is to say, horse, ox, or cow, or any beast of the like kind, for his heriot, that is or shall be either pastured within the said forest of Knaresbrough, or elsewhere, wheresoever the same shall be found:

“2. And also, that every customary tenant dying seised of any manner of building and of six acres of customary lands there, shall give such his best beast for his heriot as before is rehearsed in such manner and form as before is expressed, albeit the buildings upon the same be no messuage:

“3. Also, that every customary tenant dying seised of six acres of lands there, or above, shall pay for his heriot his best beast, as aforesaid:

“4. And also, that every customary tenant dying seised of less lands there than six acres, whether he have any building upon the same or not, so that the building be no messuage, shall pay for every acre 2s. for and in the name of his heriot, and none other heriot:

“5. Also, that every customary tenant, dying seised of more messuages than one, or of more acres of land than seven, shall pay but one heriot, how many messuages soever he have, or how many acres soever he have:

“6. Also, if any customary tenant die seised of any customary lands there in fee simple, if the next heir, by himself or by his friends, come not at the next Court, or before the year and day expired, after the death of his or their ancestors, to make his relief, that then the said lands shall be seised into the hands of the lords of the said manor, and the next heir not to have them until he pay three years’ rent for and in the name of a fine unto the lord of the same manor, over and besides his relief:

† The duchy Court of Lancaster.

\*612] **\*There is an ancient book in the under-steward's office, which has been handed down with the Court rolls, and was received by the present under-steward from his predecessor, as containing the customs of the manor or soke of Knaresborough. The customs there**

"7. Also, that no customary tenant may let his customary lands to another person, by word indenture, or other writing, but only by surrender in the Court there, for thirty-one years or under, and not above, at any one time; whereupon the accustomed fine, which is 3*d.* for every acre thereof, shall be from time to time answered unto the lord upon the grant of every such lease:

"8. Also, that, if any customary tenant do suffer any person or persons to dwell and inhabit in any builded house or cottage by the space of one quarter of a year, not being any messuage-  
stead or ancient building decayed, that then the said new building shall be forfeit to the lord, after the lawful term of the said person or persons in the same new building shall be expired, forfeited, or surrendered:

"9. Also, if any tenants seised of any customary lands, whereupon any great trees of the age of twenty-four years or above be or shall be growing, shall cut them down and sell them, or any of them, he shall grievously be amerced; but yet, nevertheless, it shall be lawful to and for the said customary tenants to take firewood meet for fuel, growing upon his or their customary lands, to burn in their houses upon the same lands and holds, and to take trees growing upon the same meet for repair or to build his or their messuages or ancient buildings there:

"10. Also, if it chance any customary tenant there at any time hereafter to do or commit any felony, or any other act for which, by the laws of this realm of England, he or they should lose their lives, if the heir of the said customary tenant, after a year and a day expired after the death of his said ancestor, come into this Court before the Chancellor and Council for the time being, and offer to make his fine there, or in the Court at Knaresbrough, that then, upon petition made to the said Chancellor and Council of this Court, he shall be admitted tenant thereof, paying to the Queen's Majesty, her heirs or successors, for his fine, six years' rent for the said lands, besides relief:

"11. Also, if any customary tenant seised of any lands customary, and take a wife, and die seised of the same, having issue by her that is heir to the same lands, that then the said wife may come, after the death of her said husband, into the Court of the lord there, and there make a fine; and at her prayer shall be admitted tenant of the whole or third part, at her liberty: If she pray the whole, then she to have the whole lands for her dower, during her life, if she keep herself sole and unmarried; and, *if she marry*, then she to have but the third part of the said customary lands, paying for every messuage 2*d.*, for every acre 3*d.*, and so after the quantity of the land by her prayed: And, if she make fine for the whole lands, then the wife to have no part of her husband's goods, but at his will and pleasure:

"12. And also, it is further ordered, that the lords, owners and occupiers of all and singular manors and lordships that do adjoin upon the said forest of Knaresbrough, and have used to have enter-common there, and which have enclosed their common and waste belonging to the said manor or lordship from the said forest, shall be seclused from having or using any common within the said forest except they have special charter grants for the same:

"13. Also, that the customary tenants, seised of any lands within the said forest of Knaresbrough, and no other, ought and may choose the grave and bedel of the said manor of Knaresbrough, at the next Court baron holden within the said manor of Knaresbrough yearly, after the feast of St. Michael the Archangel, and at no other time:

"And the said grave and bedel to gather the estreats accustomed, make impanels for the lord, and between party and party, to arrest or seize all felons' goods within the said forest, and to do all other things to their office belonging:

"14. Also, that every customary tenant within the said forest of Knaresbrough may surrender his customary lands into the hands of the lord, by the steward, learned steward, clerk of the Court, grave, or bedel, of the said forest of Knaresbrough, being nominated, known, and appointed, and in peril of death to two tenants of the same tenure, without the grave or bedel, or any other the officers aforesaid, to the use of any person or persons for term of life, or in fee simple, and not in fee tail:

"15. Also, that every customary tenant dying seised of any customary lands within the said forest of Knaresbrough in fee simple, shall pay for his relief, for every messuage 5*d.*, and for every acre of land 12*d.*, and so after the rate:

"16. Also, that he to whom any surrender is made of any messuage in fee simple, shall pay for his fine 4*d.*, and for every acre 6*d.*, and for every pennyworth a penny, and for every half-pennyworth of land one halfpenny, and so after the rate; and shall do suit to the lord's Court.

\*set forth purport to have been found by a verdict and presentment taken under a commission issued in 1611 by the Prince of Wales, Duke of Cornwall, and Earl of Chester; but they do not on the face of them purport to be the customs of the manor or soke of

and do fealty, pay heriot, take upon him the office of grave and bedel when he shall be chosen, and do other customs as hath been used:

"17. Also, that he to whom any surrender is made of any messuage for term of life, for term of years, or of any reversion, shall pay for every messuage 2*d.*, and for every acre 3*d.*, and so after the rate:

"18. And also, that every customary tenant may make a surrender to any person or persons of his customary lands after his death and his wife's death, or either of them, by force whereof he and she shall hold the land for term of his and her life, and he to whom the surrender is made shall have but one reversion after their deaths, and shall pay one fine as tenant for term of life, and one heriot to be paid of the goods of him that maketh the surrender:

"19. Also, that every customary tenant may surrender to the grave or bedel of the said forest of Knaresbrough his customary lands by bill indented, to the use of his wife, children, servants, or debtors; and that the same customary tenant may command the same grave or bedel to keep the same surrender or surrenders in his hand unto the next Court baron or Court called the sheriff's turn, to be holden next after the feast of St. Michael next after the surrender made; and to present the same unless the said customary tenant be living at the said Court, then the surrender to be void:

"20. Also, every customary tenant may surrender his customary lands to the grave or bedel of the said forest of Knaresborough, to the use of any person or persons, declaring by bill indented any condition to be performed by him that maketh the surrender, before the next Court baron and sheriff's turn to be holden next after the feast of St. Michael next after the said surrender made; if the same intent, condition, or meaning be performed before the said Court baron, that then the said surrender to be void; and, if it be not performed, then the grave or bedel to present the same surrender simply, without any intent or condition:

"21. Also, that, if any customary tenant make a surrender upon any consideration to the grave, bedel, or two tenants, of the same tenure, by bill indented, not restraining the said grave, bedel, or tenants, to make the surrender at the next Court after the surrender made, then the grave, bedel, or tenants to pay to the lord; for a fine 20*s.* and for not presenting at the second Court, other 20*s.*; and for not presenting at the third Court, 40*s.*; and that then the said grave, bedel, or tenants to forfeit to the lord all his or their lands:

"22. Also, that every customary tenant may implead one another in the Court of Knaresbrough for debt, if the debt and damage amount not over or above the sum of 100*s.*, and that the party defendant may be arrested by his body, to answer the said debt or damage:

"23. And that all the customary tenants within the said forest shall prove the testaments in the Court of the lord, and shall take letters of administration there of the goods of the dead:

"24. And also, that, if any customary tenant suffer his messuage or ancient building to decay, and suffer the same house to lie waste by the space of one year, and by three Court barons holden then next ensuing, the customary tenant shall forfeit the same house to the lord:

"25. Also, that, if any tenant be seised of any customary lands, and have issue divers daughters, they being not married at the time of the death of their ancestor, the eldest daughter shall have the land:

"And, if the eldest daughter be married in the life of her ancestor, then the land shall descend to all the other daughters unmarried, and not to the eldest; and, if all the same other daughters be married in the life of their ancestor but one, then that one so unmarried in the life of her ancestor shall have the land to her and her heirs for ever:

"And, if all the daughters be married in the life of their ancestor, then the eldest daughter shall have all the lands, as heir to her ancestor:

"26. And also, that the next friend of the party of the mother to whom the heritage may not descend, shall have the custody of the heir, and shall find surety in the Court of the lord to give the profits of the land to the heir at his full age:

"27. Also, that, if any man hath title to demand any customary lands, he shall make his relief; and, immediately upon that, he shall make fine to the lord, for to have certain lawful men of the same hold to try his right; and shall pay for every poll a penny to the clerk of the Court of Knaresbrough:

"Also, that all the customary tenants inhabiting w<sup>i</sup>thin the same forest ought to make suit to one of the King's mills within the said forest of Knaresbrough of all the grains growing within the said forest:

"28. And also, that the customary tenants within the said forest shall have common of pas-

recently, with its existence. A copy of it, marked C., accompanied and was to be taken as part of the case.(b)

\*619] \*The fines paid on surrenders and admittances in the forest are in accordance with customary A. The fines paid on surren-

they have digged for peats, turfs, and have mowen and got brackens, in any place of the said forest, at their pleasure, to be spent upon their burgages, and not elsewhere: for which the said burgesses do pay yearly to his majesty, for every burgage, one penny, in the name of a right-penny, and by some called a reak-penny; and have likewise free liberty to staf-herd, and keep their swine upon the said common at all times at their pleasure; and doth pay to his majesty a yearly rent of 3s. 4d., called by the name of swine-tack, by the hands of the grave of Scriven:

"Item. All or the greatest part of the ancient waste within the borough of Knaresbrough have used to have common for their cattle upon the said waste, called the forest of Knaresbrough, and to get turfs and peat there; but by what right they have had the same we cannot present, but refer ourselves to the Court; and in like manner the freeholder and bondholders of Scriven, Tentergate, and Knaresbrough, have used the like common there, and paid the like rent, and 4d. more for swine-tack.

"Item. The burgesses of Knaresbrough, and freeholders and bondholders of Scriven, have used to have an open racke of common, adjoining to the said forest, called Plumpton Moor, known by the said forest by marks and bounds; and the ancient tenants of Plumpton have had the like over-raick of the said forest with their cattle; and the burgesses of Knaresbrough have, by themselves and their servants, mowen and got brackens off the said moor called Plumpton Moor, by the information of Peter Benson; but now, of lato, the greatest part of that common is, by Sir Edward Plumpton, knt., now owner thereof, and was by William Plumpton, his father, enclosed, and hath erected diverse and several new cottages there, who all have common and turf-graft upon the king's forest of Knaresbrough, without right to our knowledge; therein we refer the cause to the consideration of his highness and council:

"Item. The king's majesty hath a Court holden, and time out of memory of man hath been holden and kept for his majesty and his noble progenitors, within the borough of Knaresbrough, known by the name of the borough Court: The borough men now, and all their ancestors, use and have used to do their suit and service; and there is two Courts holden there yearly, called the two head Courts,—the one kept after Michaelmas and the other after Easter,—at which all the said burgesses do their suit and service; otherwise, for default of appearance they are amerced, and for their default sometimes 2d., and sometimes 4d.; and there is upon Monday, every fifteenth day, a Court kept for actions; and when any tryals, as many of the inhabitants there shall be summoned do appear there for tryal of causes; and the said burgesses do no other suit or service to any other Court, save only at the two sheriffs' turns yearly holden for his majesty within the castle of Knaresbrough, after the terms aforesaid yearly: A jury is impanelled of the inhabitants, within the said borough, by the bailiff of the borough, and the said jury is there sworn as other juries are, and to make their presentments accordingly:

"Item. We present that some part of the lands now enjoyed for copyhold inheritance have been formerly parcel of the lord's demaynes or waste: but, whether the same be first granted by the stewards alone, or by other high authority sufficiently warranting the stewards for granting the same, we know not nor cannot certainly depose; yet the same lands called demayne lands, or the most part thereof, hath been enjoyed as copyhold inheritance since the time of Edward III., as by several surrenders in those times and since appeareth: And, before the time of Edward III., one Lilburne, a traytor, entered into the castle of Knaresbrough, where all the antient records for that purpose were kept, and maliciously destroyed all the records then being there, which malicious and traytorous dealing appeareth by some records yet extant in the castle of Knaresbrough:

"Item. There is all the time of our memory, and by report time out of mind of man have been, yearly, after every Michaelmas, chosen of those who are inheritors of any bondhold messuage, a grave, commonly called the grave of Scriven; and he is for the most part sworn at the leet next after Michaelmas holden for his majesty within the castle of Knaresbrough, and doth continue grave for one whole year: And this grave is to collect the king's bondhold rent there yearly, and to pay the same yearly to his highness' use, and to seize all heriots so falling of any bondholder dying in his time, and annually make his account for the said heriots so falling to his majesty's use; and this grave hath power to take surrenders of any bondhold lands, and to present the same according to the tenure of the surrender, and to do all other things to his office within the township of Scriven belonging:

ders and admittances in the manor are the same as in the forest, except with reference to bond-hold messuages, the fines on which are correctly \*stated in the customary B. There are no bond-hold messuages [\*620 in the forest.

"Item. There is within the township of Knaresbrough a prebend: the incumbent of this prebend or his farmer, hath, at his prebend house, two several times in the year, for the most part kept two court-leets; and hath divers messuages, cottages, and tenements to this prebend belonging, who are his own tenants and copyholders in Knaresbrough and Arkendale; and claimeth and occupieth divers lands within the fields of Knaresbrough, Scriven, and Arkendale, by the right of the said prebend; and do present all offences done within the prebendary lands at those Courts: This prebend is of the church of St. Peter, in York, and holdeth of St. Peter; and there is now prebendary Ralph Tunstall, clerk, and he and his tenants of Knaresbrough have all our time, and, by report, time out of mind of man, had common of pasture on the forest of Knaresbrough, and on Scriven Moor, for all manner of their goods whatsoever, and have got peats and turfs upon the said forest, to be used on the premises; but by what right we know not: And the prebend there for the time being hath the presentation of the vicar to the vicarage of Knaresbrough, as often as the same shall happen to become void in any of the prebender's time: In one point the jury do disagree; for, some of them, namely, Peter Keighley, Richard Palliser, William Roundell, Marmaduke Roundell, John Roundell, and Richard Andrew, [say.] that except two houses, viz., the parsonage-house, and William Nillet's house; which, as they affirm, are within the township of Scriven, and have always paid lot and scot to the same; none of the rest of the tenements being tenants to the parson have had any common right within or upon the moor of Scriven:

"Item. Sir Henry Slingsby, knight, holdeth to him and his heirs for ever all the site of the late dissolved monastery of St. Robert within the township of Knaresbrough: Those lands in old time were parcel of the fields of Knaresbrough, and given by some of the king's noble progenitors to St. Robert; and the said Sir Henry Slingsby holdeth them of the king's majesty in chief:

"Item. There is a parcel of ground betwixt the borough of Knaresbrough and the site of the said abbey, called the Abbey Plain, containing some eight acres of ground, or thereabouts, being the soil of the said Sir Henry Slingsby, and within the bounds of the site of the said Abbey, but the burgesses of Knaresbrough, and all those whose estates they have and claim, have always during our memory, and by report time out of mind of man, had common pasture for all manner of their goods and cattle there, to depasture and to dig for stone and mortar at their pleasure:

"Item. The king's majesty hath one corn-mill, in Knaresbrough, to which the burgesses and inhabitants of Knaresbrough, and Scriven, and Tentergate, and some part of Arkendale, are bound by the tenure of the said land, to the sokeage, and to grind their corn at the said mill, for so much as they spend in their houses, growing upon any part of the premises.

"Item. The borough Court, about twenty years since, was kept in a house within the said brough, called the Cockhill House; and, before that time it was kept by Mr. Burnand, being the bailiff of the said Court, in parcel of waste, called the weaver's shops; and long before that time it seemeth the same was kept in a house sold by the said Burnand to one Thompson, which house is now in the tenure of Thomas Nickson, for which house to be the court-house, and the king's house: Peter Benson, one of the jury, hath seen and read an ancient account whereof it makes mention of money disbursed upon that house by the then lord of the manor, naming, the court-house; which account was in the keeping of Francis Slingsby, Esq., father to the said Sir Henry Slingsby; and the said Court hath of late time been kept in a house claimed by Sir Henry, called by the burgesses the toll-booth; but, where the same of right ought to be kept, we cannot certainly set down:

"Item. Fishing and fowling within the lordship is the king's, and to our knowledge hath been disposed by his stewards there for the time being; but by what grant or warrant, and what the same is worth, we know not, nor can depose, saving Sir Henry Slingsby, as he affirmeth, hath the same by lease from our late queen Elizabeth:

"Item. There is, and time out of mind hath been, a bailiff of the borough of Knaresbrough,—which is at the present Sir Henry Slingsby,—and all profits in this article mentioned within the said borough, which casually falleth he or his deputy taketh; and he hath the same, as we take it, granted from the late queen aforesaid:

"Item. There is, and by report hath been time out of mind, a bailiff of Knaresbrough, known by the name of the liberty bailiff, who never of right hath any intermeddling with the borough: This bailiff is this instant Sir Henry Slingsby, but by what grant we do not certainly know; and according to this article mentioned he or his deputy taketh all, and is accountable to his majesty for the same to our knowledge:

The ancient heriots payable in the forest and manor are correctly stated in customaries A. and B.: and no heriot has ever been paid in the manor, except for bondhold messuages and lands.

\*621] \*Where a tenant in fee simple dies, leaving daughters, but no son, the daughters inherit in the forest according to the course

"Item. There are quarries of stone in a place called the Abbey Quarry, Plain Field Hill, not far off the bridge end, called Daniel Bridge; but the burgesses who now are, and all others whose estates they have, have for necessary building got stone at the said quarries without paying anything for the same; and there is one Francis Hill who farmeth the same, paying to his majesty a rent, but what the same is we know not; but did he never trouble any borough man for getting stone there for their own use to be employed for their burghages."

The remainder of this document related to the boundaries of the borough, and to the markets and fairs held therein.

(b) The customes within the soke and libtye of Knaresburghte.

"Inprmis. Thatt eury tennte in bondage or other customary tennte maye surrender their landes or tents unto ye lernyd steward, clerke of the courte, reve, grave, unto the bayliof of the libtye, their or hys deputie; and, in pyll. of deth, unto twoo tenntes of the same hold:

"Itm. Thatt eury tennte in bondage or other customarye tennte thatt dyythe seased off anye londs or tents customarye, the heyr of eury suche tennte schall paye for hys releys, thatt ys to saye, for eury. mease viijd., for eurye halffe mease iiijd., for eurye acar xijd., and for eurye oxgange vjs. viijd.:

"Item. He unto whome anye surrender is mayd of anye mease for terme of lyffe or for years schall pay for hys fyne, that ys to saye, for eurye mease ijd., for eurye acar ijd. and for eurye oxgange xxd.; and so yt ys off eurye surrender mayd uppon a reurcone [reversion]: and he unto whom anye surrender ys made in fee-symple, shall paye for hys fyne, yt ys to saye, for eurye mease iiijd., for eurye haff mease ijd., eurye acar vid., and for eurye oxgange ijs. iiijd.:

"Itm. Eurye tennte. in bondage that dyythe seased off anye bondholde londs or tents, yt ys to saye, off anye mease, halff messuage, or other anntyente buyldyng, hys heyr schall paye one haryotte.:

"Itm. The reve or grave off Screvyng for the tyme beyng maye take and receyve the pannage of all and singler the tennts and inhabitants of Screvyng, Tentergate, and Knaresburghte:

"Itm. Thatt all and singler tennt in bondage, and other customarye tennts, maye surrender their lands and tents unto ye reve, grave, or other officer abovesaid, uppon condicon maid betwixte ye pties; and also uppon condicon thatt he shall presente the sayme surrender afore or att the court barone or sheryf-torne holden nexte after the feaste off Saynte Mychaell the Archaungell than nexte followyng and insuing, whan one other reve or grave shal be choryne:

"Itm. yf anye mease, halff mease, or other anntyente buyldyng doe lye in decay by one year and three courts, the lord shall sease the same as a forfeite:

"Itm. That no customarye tennte or tennte en bondage shall fell, gyve, sell, cutt downe; take or carry awaye anyie tymbr wood beyng and growyng in and uppon anye of hys or theyr customarye lands and tents, butt onlie for the mayntennce of hys or yr edyfyce and buyldyng and other theyr necessities; and, iff he doo, he shal be greuously amerced:

"Itm. That eurye customarye tennte or tennte en bondage that dyyth seased off anye londs or tenements havyng issue doughters, they beyng unmarried at the dethe of theyr ancestors, the eldeste doughter shall have ye hoole lande: And lykewyse, yff anye suche tennte dye seased havyng issue doughters, they beyng married in the lyf off theyr auncestor, ye eldeste doughter shall have the hoole lande and herytage:

"Itm. yff anye such tennte doo dye seased off anye suche lands or tennts as afore ys expressed, and hath issue doughters, and ye eldest doughter is married in ye lyff off her ancestor, the other, beyng unmarried at the deth of their ancestor, shall have the hoole lande and herytage: and lykewyse, if twoo off the said doughters be married in ye lyff off their said ancestors, the youngest, then being unmarried, shall have the hoole lande and herytage:

"Itm. All and singler widowes, after the deth off their husbonds, shall come into the lorde's court wihin. three courtes nexte after the dethe of their saide husbonds, and shall fyne for such lands and tents as she or they shall hold or clayme in the ryghte of their said husband:

"Itm. That eurye tennte in bondage havyng one oxgange or halff oxgange, or any less quantity of bond lande, shal be the Queynes Maties reve or grave off Screvyng and shal be charged wth the collection off all the bondhold rents and farmes for one hoole year: And yt ye said reve or grave shall have, take, and enioye eurye yeare during the tyme and space thatt he or they shall fortune to be grave, all suche accustomed fees and dewties as off auntyente tyme haythe beyne usyd and accustomyd to have, thatt ys to saye, one fee stubb wthin ye foreste to be deliyuered by the surveyour or keeper of the woddes there; and to have all manner

stated in customary A., and in the manor according to the course of the common law, as stated in customary B.

\*An examined copy of the judgment-roll in an action of Doe d. Blesard v. Simpson was given in evidence by the plaintiffs, [\*622 being a judgment of the Court of Exchequer Chamber of the 15th of February, 1842 (and long before any *lis mota* in the matter of this cause), on a writ of error from the Court of Common Pleas.

\*The case is reported in 3 M. & G. 929 (E. C. L. R. vol. 42), [\*623 3 Scott N. R. 774, and that report is admitted to be correct.

This judgment-roll (the admissibility of which was disputed by the defendant) set forth a special verdict, by which it is found, amongst other things, as \*follows:—"There is an express custom within [\*624 the forest of Knaresborough prohibiting the entail of lands within the forest; but there is no such express custom within the manor. There is, however, no custom within the manor enabling the entail of copyhold: and the \*customs of the manor are considered by the tenants and steward, and (for the purposes of this trial) are admitted [\*625 to be the same in this respect as in the forest.

The property in dispute in the above action (Doe d. Blesard v. Simpson) was worth about 10,000*l.*, the \*value of that in the forest [\*626 being 9000*l.*, and of that in the manor being 1000*l.*

off deer offall or browsyne woode wthin the pke of Byllton and Hays, by one reasonable price to be paid to the Queyns Maties usse, accordig. unto the auntyente custome and usage:

"Itm. Thatt eurye tennte. in bondage shal be yearly chargyd wth ladying and carryng of the Queyn's Maiestie tymber and all other stuffe necessarie and belongynge to her graces work yearly eury May, accordyng unto ye raite as hereafter folowethe, thatt ys to say, ffor euey oxgang eight lodes, called one hoole bondhold, ffor eurye halff oxgange, called halff a bondhold, foure loades, and ffor eurie acar, halff acar, rode, and halff rode, according unto the rate afore-lymyted, allwaies allowyng and payng unto the saide tennt yerelie ffor eurie caryage soo ledde or carried by anye of the tennts aforesaide, in mann. and fforme as hereafter insuythe and folowethe, thatt ys to saye, ffor eurye doble cariage ffrome fullwt. unto Burghtebrygge iijs., and ffor eurye doble cariage ffrome Castillgarthe unto Broghtebrygge ijs., ffor eueye syngall caryage unto Burghtebrygge xvij*d.*, and ffor eurye single cariage ffrome the Castyllgarthe unto Burghtebrygge xij*d.* a tyme, ffor eurye doble cariage ffrome Allrome or Byllton pke unto Burghtebrygge. iij*s.*, ffor eurye single carryages ffrome the saide place unto Burghtebrygge 18*d.*, ffor eurye single caryage ffrome fullwythe, Allrome, or Byllton pke unto Knaresburghte Mylne, and Castillgarthe v*j*d.*, ffor eurye doble caryage ffrome the saide place unto the place abouesaide xij*d.*, ffor eurye single caryage ffrome fullwthe, Byllton .pke, and Allrome unto Newe Mylne, otherwyse called Byllton Mylne, xvij*d.*, and ffor eurye doble caryage ffrome and unto the saide place iij*s.* Itm. Eurye axletree to be one doble caryage, eurye wheall pease one doble. caryage, eurye longe tree aboue xxiiij feete in length one doble caryage, accordyng unto the auntyente usage and custome there:*

"Itm. Thatt the grave of Screvyngge ffor the tyme boyng shall collecte and yerelie take and gather off all such psone and psones as dothe clayme and challenge any turffe graste one dewtie called ye spaide lawe, dwellyng and inhibyng. wthin. the soke of Knaresburghte accordyng unto the antyente usage and custome as hayth beyn, and nown otherwyse:

"Itm. Thatt no custumarye tennte or tennte in bondage shall demyse, lett, or graunt by indenture any off hys or their londs and tents to any psone or psones our and aboue the tyme off three yeares, butt onlye by surrender:

"Itm. Thatt noo tennte in bondage shall alien, sell, gyffe, or surrender anye lands or tents beyng peell off anye bondhold, except itt be the hoole or halff bondhold:

"Itm. Thatt the grave of Screvyngge ffor the tyme beyng hath beyn accustomyd to have ffor the mayntennce off their draughte cattell one peell of grownde called the Castell Ynges, payng therefore yerlie unto the Quene's Maiestie, her heyres and successors, the auntyente and accustomed rent, that ys to saye, sixteene shillyngs by yeare."

"WYLLAM. INGLYBY.

"WYLLM. MALET.

"WILLM. TANCKARD.

"JAMES PULLEYN."

The following cases were adduced from the Court rolls and other documents with reference to the custom of entailing within the manor.

\*627] *Bilton's Case.* 26th April, 1716. Court roll of this date states a surrender by John Bilton and Maria his wife (the said Maria being solely and separately examined by Thomas Flesher, gentleman, under-steward or clerk of the Court there, and consenting in \*628] \*the presence of Robert Wyrill and Robert Sleigh, two customary tenants of the said manor) of a copyhold building with the appurtenances (therein described) to the use and behoof of William Turner and Sarah his wife, for and during the term of their natural lives \*629] \*and of the longer liver of them; and, after their decease, then to the use and behoof of the heirs of their bodies between them lawfully begotten or to be begotten; and, for default of such issue, then \*630] to the use and behoof of the right heirs of the survivor of \*them for ever, according to the custom of the said manor; and that upon this they were admitted.

18th June, 1746. By a surrender entered on the Court roll of this date, the same property was surrendered by Sarah Turner, widow, to \*631] the uses of her will, by which \*will, bearing date the 2d of June, 1746, she left all her copyhold estate in Knaresborough to her brother, John Turner, for life; and, after his death, she willed that the said copyhold estate should be sold by John Mountain, the elder, John \*632] Jewett, and George Peckett, \*or the survivor of them, to the best bidder, and the proceeds divided equally amongst her nieces therein named.

25th April, 1750. The Court roll of this date states a surrender by the said John Mountain, John Jewett, and George Peckett, of the same premises, to George Healey, in fee; and that he was admitted accordingly.

*Lightfoot's Case.* 28th August, 1717. Court roll of this date states a surrender of copyhold property (therein described) by William Lightfoot, to the use and behoof of Richard Steel and Isabella, his wife, for and during the term of their natural lives and the longer liver of them; and, after their decease, then to the use and behoof of the heirs of their bodies between them lawfully begotten or to be begotten; and, for default of such issue, then to the use and behoof of the right heirs of the said Richard Steel for ever, and that upon this they were admitted.

17th October, 1723. Court roll of this date states a conditional surrender by way of mortgage of the same property by the said Richard Steel, to the use of Samuel Clint, his heirs and assigns, for ever; and that Samuel Clint was admitted tenant.

2d of September, 1724. Court roll of this date states a surrender by the said Samuel Clint of the same property, to the use and behoof of John Morris, his heirs and assigns, for ever, according to the custom of the said manor; and that the said John Morris was admitted tenant.

*Coghill's Case.* 23d of March, 1735. By his will of this date, Marmaduke Coghill, who duly surrendered his copyhold property to the uses of his will, left and bequeathed his mansion-house of Coghill Hall, and the demesnes thereunto belonging, and all other his estates of what nature or kind soever, whether copyhold or freehold, to Gregory Rhodes, \*633] of Ripon, in the \*county of York, Esq., and his heirs, for ever, Upon this special trust and confidence, and to no other

intent or purpose whatsoever, that is to say, to the use of his grand-nephew Oliver Cramer, son of his nephew Balthazar John Cramer, during his life, without impeachment of waste; and, after the determination of that estate, to the use of the said Gregory Rhodes and his heirs during the life of the said Oliver Cramer, to support the contingent remainders thereafter limited; and, after the decease of the said Oliver Cramer, to the use of the first, second, third, and all other the sons of the said Oliver Cramer, successively, according to the seniority of age, and the several heirs male of their several and respective bodies lawfully to be begotten, the elder of the said sons and the heirs male of his body to be always preferred before the younger and the heirs male of his body; and, for default of such issue, to the use of John Cramer, eldest son of his nephew Balthazar John Cramer, during his life, without impeachment of waste; and, after the determination of that estate, to the use of the said Gregory Rhodes and his heirs during the life of the said John Cramer, to support the contingent remainders thereafter limited; and, after the decease of the said John Cramer, to the use of the first, second, third, and all other the sons of the said John Cramer, successively, according to the seniority of age, and the several heirs male of their several and respective bodies lawfully to be begotten, the elder of the said sons and the heirs male of his body to be always preferred before the younger and the heirs male of his body; and, for default of such issue, to the use of the second son of his niece Hester Coghill, lawfully begotten, and the heirs male of his body lawfully issuing: and the testator directed the persons for the time being entitled to the premises by virtue of the limitations aforesaid to use the surname of Coghill.

\*23d October, 1755. Court roll of this date, after reciting [\*634 that Marmaduke Coghill, of Coghill Hall, LL. D., who held of our sovereign lord the King, according to the custom of the manor of Knaresborough, certain premises (described), died seised thereof, goes on to state, that, after his death, at that Court came Oliver Coghill, his grandnephew, and devisee in the will of the said Marmaduke Coghill, bearing date the 23d of March, 1735, whereby the said Marmaduke Coghill left and bequeathed the said mansion-house of Coghill Hall, and the demesnes thereunto belonging, and all other his estate in the county of York, to the said Oliver Coghill, of which the several premises first thereinbefore mentioned were parcel; and that he the said Oliver Coghill was admitted thereto, to hold to the said Oliver Coghill and his assigns according to the purport, true intent, and meaning of the last will and testament of the said Marmaduke Coghill, deceased, with such powers as were therein given to him touching the same, and according to the custom of the said manor.

The fine paid on the said admittance was that payable on an estate for life.

Part of the property comprised in the said admittance was of bondhold tenure.

The said Oliver Coghill died before the admittance next mentioned, without ever having had a son.

4th January, 1775. Court roll of this date recites that Marmaduke Coghill, who held of our sovereign lord the King, according to the cus-

tom of the manor of Knaresborough, certain premises (described), died seised thereof; and that, after his death, came Oliver Coghill, Esq., a devisee named in the will of the said Marmaduke Coghill, dated 23d March, 1735, whereby the said Marmaduke Coghill bequeathed the said \*635] premises (amongst others), and all other his estate in the \*county of York, to the said Oliver Coghill, and prayed to be admitted to the said premises, and he was admitted thereto according to the purport of and with such powers as were given him by the said will; and that the said Oliver Coghill was then lately dead seised of the said messuages, lands, and premises: and after such recital, goes on to state, that thereupon, at that Court came John Coghill, Esq., also named a devisee in his said will, and prayed to be admitted, and the premises aforesaid were granted, to hold to the said John Coghill and his assigns according to the custom of the manor.

The fine paid on the said last-mentioned admittance was that payable on an estate for life.

The said Oliver Coghill and John Coghill were the same persons as Oliver Cramer and John Cramer mentioned in the will of Marmaduke Coghill.

At the time of the said admittance of the 4th of January, 1775, and until her death in 1778, Hester, the niece of the said Marmaduke Coghill, mentioned in his will of 1735, was the heiress at law according to the custom of the manor of the said Marmaduke Coghill. Upon her death, the said John Coghill became and was the heir at law according to the custom of the manor of the said Marmaduke Coghill.

29th December, 1787. By surrender of this date, the said Sir John Coghill of Coghill Hall, and John Thomas Cramer Coghill, Esq., his son and heir apparent, surrendered a piece of copyhold land (being part of the copyhold premises devised by the said will of Marmaduke Coghill), to the use of Sir Thomas Turner Slingsby, his heirs and assigns, for ever, in lieu and exchange of certain other land (described): and at a Court held on the 2d of January, 1788, for the said manor, the said Sir Thomas Turner Slingsby was admitted accordingly, to hold to him, his heirs and assigns, for ever.

\*636] \*29th December, 1787. By a surrender of this date, the said Sir Thomas Turner Slingsby, in lieu of and exchange for the said piece of copyhold land so surrendered to him and his heirs as last aforesaid, surrendered a piece of copyhold land (described) to the said Sir John Coghill, for life; and, after his decease, to the said Sir John Thomas Cramer Coghill (afterwards Sir John Thomas Coghill) and his heirs, for ever.

29th December, 1787. By surrender of this date, Sir John Coghill, and John Thomas Coghill, Esq., his son and heir apparent, surrendered a copyhold house in Knaresborough (being other part of the copyhold premises devised by the said will of Marmaduke Coghill), to the use of William Henlock, his heirs and assigns, for ever, who at a Court held on the 2d of January, 1788, was admitted tenant accordingly.

27th March, 1798. Court roll of this date recites that the said Sir John Coghill, late of Coghill Hall, in the county of York, Bart., who held of our sovereign lord the King according to the custom of the manor of Knaresborough certain premises (described), and comprising the principal part of the copyhold premises devised by the said will of

Marmaduke Coghill, lately departed this life seised thereof, leaving the said John Thomas Coghill, then Sir John Thomas Coghill, his eldest son and heir at law: and, after such recital, goes on to state, that, at a Court held that day, the said Sir John Thomas Coghill was admitted tenant accordingly, to hold to him, his heirs and assigns, for ever.

The fine paid on this last-mentioned admittance was that payable on an estate in fee.

The copyhold premises in question in the present action were comprised in the last-mentioned admittance, and were sold by the said Sir John Thomas Coghill to George Jackson, of Dunkeswick; and, on \*the 12th of April, 1800, were surrendered by the said Sir John Thomas Coghill to the use of the said George Jackson, his heirs [\*637 and assigns, for ever; and the said George Jackson was admitted accordingly.

The said Sir John Thomas Coghill was never married.

Collins's Case. 22d April, 1780. By his will, of this date, Thomas Collins, vicar of Knaresborough, who died seised of copyhold lands in both the manor and forest, which he had duly surrendered to the uses of his will, devised all his freehold and copyhold estates unto the use of Thomas Turner Slingsby, Loftus Hill, and John Watson, their heirs and assigns, for ever, upon trust for his daughter Eleanor for life; and, after her decease, in trust for her child or children as she should appoint; and, in default of and subject to any such appointment, in trust for her child or children and the heirs of their bodies, such children if more than one to take in equal shares as tenants in common; and, in default of such issue of his daughter Eleanor, in trust for his daughter Elizabeth, for life; and, after her death, in trust for her child or children as she should appoint; and, in default of or subject to any such appointment, in trust for her child or children and the heirs of their bodies, as in the case of Eleanor's children; and in default of all such issue as aforesaid, then to the use of and in trust for James Collins, the testator's nephew, and his heirs and assigns, for ever.

The testator Thomas Collins died in or about the year 1788, without leaving any issue besides his two daughters. His daughter Eleanor died, without ever having had children, in or about the year 1812.

In 1813, his daughter Elizabeth surrendered to the use of her will all her copyhold lands both in the manor and in the forest; and by her will, made in \*1820, she devised all her messuages, lands, tenements, and hereditaments, whatsoever and wheresoever, and of [\*638 what nature or kind soever, over which she had any disposing power, unto and to the use of William Collins, son of her late cousin James Collins, his heirs, executors, administrators, and assigns.

Elizabeth died in 1821 without ever having had children: and, in 1822, William Collins, the devisee named in her will, was admitted to such of her copyhold lands which had belonged to the said Thomas Collins, vicar of Knaresborough, as were within the forest; and Thomas Collins, the heir at law according to the custom of the manor of James Collins, the ultimate devisee named in the will of 1780, was admitted to such of her copyholds which had belonged to the said Rev. Thomas Collins, vicar of Knaresborough, as were within the manor.

The admittance of William Collins recited that the Rev. Thomas Collins, vicar of Knaresborough, who held of our sovereign lord the

King according to the custom of the Forest of Knaresborough certain messuages and lands (described), departed this life seised thereof, leaving Eleanor Collins and Elizabeth Collins, his two daughters, co-heiresses at law; and that Eleanor Collins some time since departed this life intestate, seised of an undivided moiety of the said premises, leaving the said Elizabeth Collins her heiress, who lately departed this life seised of the premises, having first duly surrendered the same to the use of her will; and, by her last will and testament in writing, duly executed, bearing date the 4th of December, 1820, gave and devised the same unto and to the use of William Collins, son of her late cousin James Collins, his heirs, executors, administrators, and assigns, as in and by the said surrender and will enrolled amongst the records of the \*639] said forest more \*fully appeared; and, after such recitals, went on to state, that, at that Court, the said William Collins was admitted tenant accordingly, to hold to him, his heirs and assigns, according to the purport, true intent, and meaning of the said will, and according to the custom of the forest.

The admittance of Thomas Collins recited that the Rev. Thomas Collins, vicar of Knaresborough, who held of our sovereign Lord the King according to the custom of the manor of Knaresborough certain land and premises (described), died seised thereof, having first duly surrendered the same to the use of his will; and, by his last will and testament, duly executed, dated the 22d of April, 1780, gave and devised the same, in case of failure of lawful issue of his two daughters, Eleanor Collins and Elizabeth Collins, and from and after the decease of the survivor of them, to the use of James Collins, his nephew, and to his heirs and assigns for ever; and that the said Eleanor Collins departed this life in or about the year 1812, without leaving lawful issue; and that the said James Collins departed this life on the 25th of October, 1820, leaving the Rev. Thomas Collins, rector of Barningham, his eldest son and heir at law; and that the said Elizabeth Collins departed this life the 2d of December then last; and, after such recitals, went on to state that the said last-named Thomas Collins was then admitted tenant, to hold to him, his heirs and assigns, for ever, according to the purport, true intent, and meaning of the said will, and according to the custom of the manor.

The said last-mentioned Thomas Collins was, at the time of his being so admitted as aforesaid, the great-nephew and heir at law according to the custom of the manor of the said Thomas Collins, the testator of 1780.

\*640] \*The two last-mentioned admittances were prepared by the said William Collins, who in the year 1821 and for several years previously had been a practising solicitor at Knaresborough.

Cant's Case. 7th February, 1801. By his will of this date, Thomas Cant, of Knaresborough, mason, gave and devised all his dwelling-houses or tenements, situated in Briggate, in Knaresborough, and also all his dwelling-houses or tenements in Kirkgate, in Knaresborough, unto his wife, Mary Cant, and her assigns, for and during the term of her life; and, from and after her decease, he gave and devised the same to his niece Mary Walker, his heirs and assigns, for ever, Provided, that, in case the said Mary Walker should die without leaving lawful issue, then he devised the said dwelling-houses in Briggate unto Thomas Cant, the son

of James Cant, of Bondgate, near Ripon, his heirs and assigns, for ever; and, in that case, he devised the dwelling-houses in Kirkgate to Mary Leeming, daughter of Isabel Cant, her heirs and assigns, for ever.

13th April, 1814. Court roll of this date recites that the said Thomas Cant, who held of our sovereign Lord the King certain copyhold premises (described, and being those mentioned in the will), in Kirkgate and Briggate, lately departed this life seised thereof, having first duly surrendered the same to the use of his will; and by his last will and testament in writing, duly executed, bearing date on or about the 7th of February, 1801, gave and devised the same unto his dear wife Mary Cant and her assigns for and during the term of her natural life, as in and by the said surrender and will amongst the records of the said manor might more fully appear: and, after such recital, states that Mary Cant was at that Court admitted tenant of the premises, to hold to the said \*Mary Cant and her assigns for and during the term [\*641 of her natural life, according to the purport, true intent, and meaning of the said will and the custom of the said manor.

29th October, 1856. Court roll of this date recites that Thomas Cant, who held of our late sovereign Lord King George the Third, according to the custom of the manor of Knaresborough, a building (described and being the said dwelling-house in Briggate), departed this life seised thereof, having duly surrendered the same to the use of his will; and, by his last will, duly executed, dated the 7th of February, 1801, devised the same to his wife Mary Cant for life; and, after her decease, to his niece Mary Walker, her heirs and assigns, for ever, with a proviso, and he by his will declared, that, in case the said Mary Walker should happen to depart this life without leaving lawful issue, then he gave and devised the said premises unto Thomas Cant, the son of James Cant, his heirs and assigns: and that the said Mary Cant died many years ago, and the said Mary Walker died on the 20th of May, 1855, unmarried and without issue, and that the said Thomas Cant died in September, 1837, leaving William Cant, his eldest son and heir at law, him surviving; and, after such recitals, goes on to state that thereupon, at [that Court, the said William Cant was admitted, to hold to him, his heirs and assigns, for ever, according to the purport, true intent, and meaning of the said will, and according to the custom of the manor.

7th November, 1856. By surrender of this date, the said William Cant, in consideration of 50*l.* paid by William Whitaker, surrendered the said building in Briggate to the use of the said William Whitaker, his heirs and assigns, for ever; and, at a Court held on the 19th of the same November, the said William \*Whitaker was admitted to the [\*642 said building accordingly.

It is not known who is the heir at law of Thomas Cant, the testator of 1801. No one has been admitted to the copyhold tenement in Kirkgate mentioned in his will since the death of the said Mary Walker in May, 1855.

Slingsby's Case. 21st January, 1800. Sir Thomas Turner Slingsby, by his will of this date, devised and bequeathed all his manors, messuages, lands, tenements, and hereditaments, of what nature or kind soever or wheresoever situate (which included copyholds both in the manor and forest, surrendered to the use of his will), to Henry Dun-

combe and John Watson, their heirs, executors, administrators, and assigns, according to their several natures and tenures, To the use of the said Henry Duncombe and John Watson, their heirs, executors, administrators, and assigns, Upon trust (subject to a term of 500 years to secure an annuity to his sister Sarah) for testator's eldest son, Thomas Slingsby, for life; and, from his decease, upon trust for the first son of his body lawfully to be begotten and the heirs male of the body of such first son lawfully issuing; and, in default of such issue, then upon trust for the second, third, fourth, and other sons of the said Thomas Slingsby, successively, in tail male; and, in default of such issue of testator's son Thomas, upon trust for testator's son Charles Slingsby, for life; and, from his decease, upon trust for the first son of Charles and the heirs male of the body of such first son; and, in default of such issue, then upon trust for the second, third, fourth, and other sons of Charles Slingsby, successively, in tail male; and, in default of such issue of Charles, then upon trust for the daughters of Thomas as tenants in common, and the several and respective heirs of the bodies \*643] of such daughters, with cross-remainders among them, and the heirs of their respective bodies, in case there should be more than one, and one or more should happen to die without leaving issue; and, in default of such issue, then in trust for the daughters of Charles, in like manner; and, in default of such issue of Charles, in trust for testator's sister Sarah Slingsby for life; and, after her decease, for her first and other sons successively in tail male; and in default of such issue, then upon trust for the daughters of testator's sister as tenants in common, with cross-remainders as before directed in the cases of the daughters of Thomas and Charles; and, in default of such issue, then upon trust for testator's own right heirs for ever.

1st October, 1806. The Court roll of this date recites that Sir Thomas Turner Slingsby, who held of our sovereign Lord the King according to the custom of the manor of Knaresborough certain premises (described, about 120 acres), was then lately dead seised thereof, having first duly surrendered the same to the use of his will; and, in and by his last will, bearing date the 21st of December, 1800, gave and devised the same unto or in trust for his son, Thomas Slingsby, then Sir Thomas Slingsby, bart., for and during the term of his natural life, as in and by the said surrender and will, enrolled amongst the rolls of the said manor, did more fully appear; and, after such recital, goes on to state the admittance of the said Sir Thomas Slingsby, to hold the premises for and during the term of his natural life, according to the purport, true intent, and meaning of the said will, and according to the custom of the said manor.

9th of December, 1846. Court roll of this date recites that Sir Thomas Turner Slingsby, who held of our sovereign Lord King George the Third, according to the custom of the manor of Knaresborough, certain \*644] premises described (being the same as those described in the admittance of 1st October, 1806, with the exception of about five acres, which were included in the admittance of the 1st of October, 1806), departed this life on or about the 11th of April, 1806, leaving Thomas Slingsby (the eldest son) and Charles Slingsby, his only two sons, him surviving; and that the said Charles Slingsby departed this life on or about the 20th of May, 1832, in the lifetime of his elder

brother, Sir Thomas Slingsby, leaving Charles Slingsby, his only son and heir; and that the said Sir Thomas Slingsby also departed this life on or about the 26th of February, 1835, intestate as to his real estate, and unmarried, leaving the said Charles Slingsby (the son) his only nephew and heir at law; and, after such recital, goes on to state the admittance of Charles, then Sir Charles Slingsby, Bart., to hold the premises to him, his heirs and assigns, for ever, according to the custom of the said manor.

At the same Court (9th of December, 1846), the son, Sir Charles Slingsby, was by a separate admittance also admitted as nephew and heir at law to his uncle Sir Thomas, of copyhold property in the forest, which was included in the same devise as the copyhold property in the manor.

**Bowen's Case.** 5th and 6th September, 1823. By a marriage-settlement made by indentures of lease and release of this date, the release being between Adderley Beamish of the first part, Fanny Bernard of the second part, and Arthur Beamish and Samuel Bernard Beamish and the Rev. John Pretyma and John Plumbe of the third part, and reciting, amongst other things, that the said Fanny Bernard was seised in fee of certain freeholds, and also seised of the several copyhold lands and premises thereafter mentioned for an estate of inheritance according to the custom of the \*manor of Knaresborough, the said [\*645 freehold lands were conveyed to the said Arthur Beamish Bernard, Samuel Bernard Beamish, John Pretyma, and John Plumbe, their heirs and assigns, to the use of the said Fanny Bernard, her heirs and assigns, until the solemnization of the intended marriage between the said Adderley Beamish and Fanny Bernard, and, from and after the solemnization thereof, to the use of the said Arthur Beamish Bernard, Samuel Bernard Beamish, John Pretyma, and John Plumbe, their heirs and assigns, during the natural lives of the said Adderley Beamish and Fanny Bernard, upon trust to pay the rents to the said Fanny Bernard during her natural life, and, after her decease, upon trust to pay the same to the said Adderley Beamish and his assigns during his life, subject to the proviso thereafter contained; and, after the decease of the survivor of them the said Adderley Beamish and Fanny Bernard, then, in case there should be but one child of the body of the said Adderley Beamish on the body of the said Fanny Bernard to be begotten, to the use of such only child and the heirs of his or her body issuing, with divers remainders over: and the said Fanny Bernard, with the consent of the said Adderley Beamish, did by the said indenture of release covenant with the said Arthur Beamish Bernard, Samuel Bernard Beamish, John Pretyma, and John Plumbe, to surrender at the next Court for the manor of Knaresborough the several copyhold messuages, lands, and hereditaments thereafter particularly described, to the same uses and for the same intents and purposes as in the said indenture were declared as aforesaid concerning the said freehold; and it was in the said indenture provided, that, in case the said marriage should be solemnized, and the said Fanny Bernard should die in the lifetime of the said Adderley Beamish, and the said Adderley [\*646 \*Beamish should marry again, and there should be only one child of the body of the said Adderley Beamish on the body of the said Fanny to be begotten living at the time of such second marriage, then,

notwithstanding the limitations and trusts thereinbefore contained, from and after such second marriage he the said Adderley should receive and have during his life the rents of one moiety only of the said trust estates then remaining, and the said Arthur Beamish Bernard, Samuel Bernard Beamish, John Pretyman, and John Plumbe should during the life of the said Adderley receive the rents of the other moiety, and pay the same to such person or persons as the same would go and be payable to in case the said Adderley were actually dead.

17th September, 1823. Court roll of this date states a surrender made out of Court on the 8th of September, 1823, of certain copyhold premises therein described, being the same copyhold premises mentioned in the release of 6th of September, 1823, and which were of bondhold tenure, by the said Fanny Bernard, in consideration of the sum of 10s. apiece paid by the said Arthur Beamish Bernard, Samuel Bernard Beamish, John Pretyman, and John Plumbe, and also for divers other good and valuable causes and considerations her thereunto specially moving, to the use and behoof of them the said Arthur Beamish Bernard, Samuel Bernard Beamish, John Pretyman, and John Plumbe, their heirs and assigns for ever, upon divers trusts either then already declared or thereafter to be declared of and concerning the same, by the rents and services therefore due and of right accustomed, according to the custom of the said manor: and the said Court roll then states the admittance thereupon of the said Arthur Beamish Bernard, Samuel Bernard Beamish, John Pretyman, and John Plumbe, to the aforesaid \*647] premises, with the appurtenances, to hold to the said Arthur Beamish Bernard, Samuel Bernard Beamish, John Pretyman, and John Plumbe, their heirs and assigns, for ever, upon the trusts aforesaid, according to the custom of the said manor.

The said marriage between the said Adderley Beamish and Fanny Bernard was duly solemnized; and there was issue thereof only one child, viz. Mary Isabella.

The said Adderley Beamish assumed the name of Bernard in addition to his own.

The said Fanny Bernard died leaving the said Adderley Beamish Bernard and the said only child her surviving.

The said Adderley married again; and afterwards the said only child, Mary Isabella, in May, 1847, married John Bowen the younger.

8th April, 1848. By indenture of this date, between the said John Bowen the younger and the said Mary Isabella his wife (therein described as Mary Isabella Beamish Bowen, otherwise Bernard), of the first part, Adderley Beamish Bernard, father of the said Mary Isabella, of the second part, Thomas Epenetus Crooke, Henry Thomas Garde Brown, and John Campbell, of the third part,—after reciting the said indenture of the 6th of September, 1823, and reciting the said surrender and admittance of the respective dates of the 8th and 17th of September, 1823, and the solemnization of the marriage between the said Adderley and Fanny, and that there was issue thereof but one child, the said Mary Isabella Bowen, party thereto, and that the said Fanny Bernard died leaving the said Adderly her surviving, and that the said Adderley had lately married again, and that thereupon the said Mary Isabella Bowen as such only child was then entitled to an equitable estate tail in possession of and in one moiety of the said copyhold lands

and premises, \*and was also entitled to an equitable estate tail of and in the other undivided moiety thereof in remainder expectant on the determination of the equitable life estate of the said Adderley Beamish Bernard, the legal estate in the said copyhold lands and premises being then vested in the said Arthur Beamish Bernard, Samuel Bernard Beamish, John Pretyman, and John Plumbe, and their heirs; and reciting the said marriage of the said Mary Isabella and John Bowen the younger, and that previous thereto articles of agreement were entered into bearing date the 18th of May, 1847, whereby it was agreed that the said entail in the said copyhold hereditaments should be barred, and that the same should be conveyed to trustees to be nominated, upon trusts therein expressed; and also reciting that the said Mary Isabella Bowen had nominated Thomas Epenetus Crooke, Henry Thomas Garde Brown, and John Campbell, parties thereto, as trustees as aforesaid, and had applied to the said Adderley Beamish Bernard as protector of the said settlement of the 6th of September, 1823, as to the said equitable estate tail in the said undivided moiety of the said copyhold premises in which the said Adderley was seised of an equitable life estate, to consent to the conveyance thereafter contained, in order to enable the said John Bowen and Mary Isabella his wife to make such disposition and conveyance effectual against all persons after the determination of the estate tail therein of the said Mary Isabella Bowen in manner thereafter expressed, which the said Adderley agreed to do; and also reciting that the trustees of the said settlement of the 6th of September, 1823, were unwilling to continue to act, and that it had been agreed that the said trust estate should be transferred to the said Thomas Epenetus Crooke, Henry Thomas Garde Brown, and \*John Campbell, discharged from the trusts of the said indenture of the 6th of September, 1823, but upon the trusts to be declared in a settlement intended to be executed pursuant to the said articles of the 18th of May, 1847; and also reciting that delays had arisen in procuring a surrender of the said copyhold hereditaments from the said trustees, in whom the legal estate was then vested, and that it had been agreed that the equitable estate therein of the said Mary Isabella Bowen and her husband and the said Adderley Bernard should be conveyed to and vested in the said Thomas Epenetus Crooke, Henry Thomas Garde Brown, and John Campbell, and their heirs, and that such surrender as aforesaid should be passed to the uses of the said Thomas Epenetus Crooke, Henry Thomas Garde Brown, and John Campbell, and their heirs, to the uses and upon the trusts thereafter mentioned,—It was witnessed, that, in pursuance of the said agreement, and in consideration of 10s. sterling to them paid by the said Thomas Epenetus Crooke, Henry Thomas Garde Brown, and John Campbell, and in order to defeat and destroy all equitable or other estates tail of the said Mary Isabella Bowen in the messuages, lands, and premises thereby granted, and all estates, rights, interests, and powers to take effect after the determination or in defeasance of such estates tail, and in order to convey and assure the inheritance of the same premises according to the custom of the said manor unto the said Thomas Epenetus Crooke, Henry Thomas Garde Brown, and John Campbell, to the uses, and upon and for the trusts, intents, and purposes, and under and subject to the powers, provisoes, declarations, and

agreements thereafter mentioned, they the said John Bowen and Mary Isabella his wife, by virtue of the powers of the Act for the abolition of fines and recoveries (3 & 4 W. \*4, c. 74), with the consent \*650] and approbation of the said Adderley Beamish Bernard, as such protector, as to one moiety, testified by his being a party thereto, and also the said Adderley, according to his estate and interest in the hereditaments thereafter described, did grant and dispose of, release, and confirm the same copyhold hereditaments which were in and by the said indenture of the 6th of September, 1828, covenanted to be surrendered as aforesaid, and whereof the said Arthur Beamish Bernard, Samuel Bernard Beamish, and John Pretymen were admitted tenants, and all other the copyhold hereditaments which were of the said Fanny Bernard in Scriven-with-Tentergate aforesaid, To hold the same to the said Thomas Epenetus Crooke, Henry Thomas Garde Brown, and John Campbell, their heirs and assigns, for ever, upon the trusts to be declared in an indenture of settlement intended to be forthwith executed in pursuance of the said articles of the 18th of May, 1847; and, in the mean time, and until the execution of such indenture, upon the trusts of the said articles, freed and discharged from the estate tail of the said Mary Isabella Bowen, and all remainders, reversions, estates, rights, interests, and powers to take effect after the determination or in defeasance of such estate tail, and also freed from the trusts of the said settlement of the 6th of September, 1823.

The said indenture of the 8th of April, 1848, was duly executed by the several parties thereto, having been acknowledged by the said Mary Isabella Bowen, who was examined apart before two commissioners for taking the acknowledgments of married women; and the said indenture was on the 17th of May, 1848, entered on the Court rolls of the said manor.

On the 8th of April, 1848, the marriage settlement stated in the last-mentioned indenture to be intended to be forthwith executed in pursuance of the said articles of the 18th of May, 1847, was duly executed; \*651] \*the date and parties being the same as those of the indenture of the 8th of April, 1848, above stated to have been entered on the Court roll.

The aforesaid Rev. John Pretymen died before the end of the year 1848.

26th April, 1849. Court roll of this date states a surrender made out of Court on the 25th of April, 1849, of certain copyhold premises therein described (being the same copyhold premises mentioned in the release of the 6th of September, 1823, and also an allotment containing 2a. 1r. 28p., awarded in respect thereof under an Act of Parliament for enclosing commons called Scotton and Scriven Moors, in 1830, and declared to be copyhold of the said manor), by the said Arthur Beamish Bernard, Samuel Bernard Beamish, and John Plumbe, in pursuance of certain articles of agreement dated the 18th of May, 1847, made and entered into before the marriage of the said Mary Isabella with John Bowen the younger, and also of a certain indenture or deed of settlement made in pursuance of the said articles of agreement, bearing date the 8th of April, 1848, and made between the said John Bowen and Mary Isabella his wife of the first part, the said Adderley Beamish Bernard of the second part, and the said Thomas Epenetus Crooke, the said

Henry Thomas Garde Brown, and the said John Campbell of the third part, and for carrying the same into effect so far as respects the said copyhold premises, and also in consideration of 10s. to the said Arthur Beamish Bernard, Samuel Bernard Beamish, and John Plumbe in hand paid by the said Thomas Epenetus Crooke, Henry Thomas Garde Brown, and John Campbell, To the use and behoof of the said Thomas Epenetus Crooke, Henry Thomas Garde Brown, and John Campbell, their heirs and assigns, for ever, Upon the trusts, and for the intents and purposes, and subject to the several powers, provisoes, declarations, and agreements declared and \*contained in the said indenture of settlement of the 8th of April, 1848, respecting the same hereditaments and premises intended to be surrendered as aforesaid, by the rents and services therefore due and of right accustomed, according to the custom of the said manor: and the said Court roll then states the admittance thereupon of the said Thomas Epenetus Crooke, Henry Thomas Garde Browne, and John Campbell, to the said premises, with the appurtenances, to hold to them, their heirs and assigns, for ever, upon the trusts aforesaid, according to the custom of the said manor. [\*652

By subsequent surrenders of the 4th of May, 1850, and 28d of November, 1858, the whole of the copyhold property included in the indenture of the 8th of April, 1848, was surrendered to purchasers by the then trustees under the settlement of that date, and by the said John Bowen and Mary Isabella his wife; and the purchasers were admitted accordingly.

At the time of these surrenders, the said Mary Isabella was heiress at law, according to the custom of the manor, of the said Fanny Beamish, formerly Fanny Bernard, and had had no issue.

All wills under which any copyhold either in the forest or manor is taken, are entered on the Court rolls in the same books as entries of surrenders and admittances. The surrenders and admittances only recite such parts of the wills and in such manner as the persons preparing the surrenders and admittances may think proper.

All surrenders mentioned throughout this case are to be taken to have been duly presented: and all wills stated to have been made are to be taken to have been duly executed and attested to pass real estates.

The Court rolls were carefully searched in 1835 for the purposes of the action of Doe d. Blesard v. Simpson, before mentioned, and also within the last two years for the purpose of the present action.

\*No admittance except that of James Jackson has been found having an express habendum with limitations to the heirs of the body, or any other limitation in tail; but persons admitted to any estate under a will, whether such will purports to create an estate tail or not, are generally admitted to hold according to the purport, true intent, and meaning of the will, and according to the custom of the manor. [\*653

No entry other than those herein stated is to be found of a surrender purporting to bar an estate tail.

The Court was to decide from such of the evidence above set forth as was properly admissible between the parties, so far as such decision was necessary for the determination of the case, whether there exists within the manor or soke of Knaresborough a custom for entailing copyhold lands, and, generally, to draw such inferences as they might consider warranted by the evidence and facts stated.

The question for the opinion of the Court was,—whether the claimants or either of them were or was entitled to recover the copyhold lands for which the action was brought. If the opinion of the Court should be in the negative, the verdict was to be entered generally for the defendant; but, if in the affirmative, the verdict was to be entered for the claimants or one of them as to the copyhold, and for the defendant as to the freehold, in such manner as the Court should direct.

Nothing contained in this case was to be evidence against either of the parties thereto, even as between themselves, except with reference to the claim in the present action so far as it relates to the copyhold, as, in order to simplify the statements, many circumstances relating to the property, and many qualifications and exceptions contained in the documents, have been omitted, when they were immaterial to the matter in dispute.

\*654] *\*Manisty*, Q. C. (with whom were *Badeley* and *Kemplay*), for the plaintiffs.(a)—Substantially, two questions are presented for the opinion of the Court in this case,—first, what is the effect of the will of George Jackson, of Dunkeswick, the testator of 1814,—secondly, whether there is a custom within the manor of Knaresborough to entail copyholds.

1. By his will, George Jackson devised the property in question to his nephew John Jackson for life; and, from and after his decease, to James Jackson and the heirs male of his body lawfully issuing, for ever,—which, in the case of freehold, would convey an estate in fee. Then follow these words,—“Provided always, that, in case the said James Jackson shall happen to depart this life without leaving issue male of his body lawfully \*655] *\*begotten*, him surviving, then I give and devise all my said real estate, from and after the decease of the said John Jackson or James Jackson, which shall last happen, unto my nephew George Jackson, his heirs and assigns, for ever.” The true construction of the whole will is, to give to John an estate for life, and to James an estate tail if there had been any custom to warrant it, but, failing the custom, to give James a fee simple conditional, with an executory devise over to George in the event of a failure of issue at the death of James. That is in effect decided in the case referred to of *Doe d. Simpson v. Simpson*, 4 N. C. 333, 5 Scott 770, and, in error, *Doe d. Blesard v. Simpson*, 3 M. & G. 929 (E. C. L. R. vol. 42), 3 Scott N. R. 774, where all the older authorities will be found collected.

(a) The points marked for argument on the part of the plaintiffs, were as follows:—

“1. That, under the will of George Jackson, of Dunkeswick, of the 5th of May, 1814, James Jackson took in the copyholds devised by that will a fee simple conditional, with an executory devise over, in the event of his dying without leaving issue male of his body lawfully begotten & him surviving, to George Jackson, of Burton Leonard, in fee:

“2. That, on the death of the said James Jackson without ever having had any issue of his body, the copyholds in question vested either in the claimant William Hardcastle, as the surviving devisee under the will of the said George Jackson, of Burton Leonard, or in the other claimant, Samuel Jackson, as the heir at law according to the custom of the manor of the said last-named George Jackson:

“3. That there is no custom to entail in the manor of which the lands in question are claimed as copyhold:

“4. That, if there is such a custom, and if, according to that custom, the said James Jackson took an estate tail in the copyholds under the said will of the said George Jackson, of Dunkeswick, then such estate tail was not properly or legally barred, and, on the death of the said James Jackson, without ever having had any issue of his body, the copyholds vested in one or other of the claimants.”

That being so, if there be no custom to entail in this manor, the plaintiffs, or one of them, will be entitled to the judgment of the Court.

2. The manor of the forest of Knaresborough and the manor of Knaresborough are two distinct manors adjoining each other: both are within the honor of Knaresborough, which forms part of the possessions of the duchy of Lancaster. There is out of the forest what is called the liberty of the forest of Knaresborough, and that comprises, inter alia, the whole of the manor of Knaresborough. There are peculiarities about these two manors which are probably not to be found in any other part of the kingdom. Besides being situate within the same honor, and both forming part of the possessions of the duchy of Lancaster, they have but one Court and one set of Court rolls, one steward, one under-steward, and one bedel or greive. In the years 1770 and 1774, two acts were passed for enclosing the wastes of the forest; and some of the copyholders of the manor claimed rights of common over these wastes, and received allotments in respect of such claims. Conceding that, in an ordinary case, the \*customs of one manor are not evidence as to those of another manor though immediately adjoining, [\*656 yet here, it is submitted, such evidence may fairly be admitted, seeing that the two manors are so intimately connected with each other. [ERLE, C. J.—Brought, as it were, into unity. BYLES, J.—Or, as the phrase is in *Doe d. Barrett v. Kemp*, 7 Bingh. 332, 5 M. & P. 173, “unity of character.”] Now, the customs of the forest are proved by the customary marked A., antè, p. 611, the 14th clause of which shows that the customary tenants of the forest may surrender their customary lands “to the use of any person or persons for term of life, or in fee simple,” but “not in fee tail.” And the following statement of the custom, as agreed between the parties, appears upon the special verdict in *Doe d. Blesard v. Simpson*,—“There is an express custom within the *forest* of Knaresborough prohibiting the entail of lands within the forest; but there is no such express custom within the said *manor*. There is, however, no custom within the manor enabling the entail of copyhold: and the customs of the manor are considered by the tenants and steward, and for the purpose of the trial were admitted, to be the same in this respect as in the forest.” The customary C., antè, p. 620, which professes to set out the customs “within the soke and liberty of Knaresborough,” mentions in paragraph 3 the fines payable on surrenders; but no mention is made of a fine payable for an admittance upon a surrender in fee tail. Nowhere is there any recognition of any such estate in the manor: and without a custom no fine can be taken. Whether or not the customary marked B., antè, p. 617, is admissible in evidence, is wholly immaterial; though the place where it was found (see p. 612) would primâ facie seem to authenticate that document. In no one of the instances gathered from the Court rolls of the manor is there to be found an \**admittance* in express words to an estate tail, with the exception of the one in question, in 1836. Reli- [\*657  
ance will be placed for the defendant upon cases where parties have attempted to limit estates to trustees to hold to uses which would be equitable entails. That has been a mode often resorted to for the purpose of getting a sort of equitable estate tail where there was no custom in the manor to warrant the entail. But, in all these cases, the admittance will be found directly to negative the party's having the actual

estate in fee. Cases of fee simple conditional also may be referred to: but these stand upon a totally different footing. The instances referred to from the Court rolls will be found also to relate to copyholds in the forest as well as in the manor, where it was attempted in the same instrument to create an entail in both. If there be any evidence, and it comes to a question on which side the evidence preponderates, the onus being on the defendant, who affirms the existence of the alleged custom, he must fail.

*Bliss*, Q. C. (with whom were *Mellish* and *Dart*), for the defendant. (a) — Upon the true construction of the will in question, there can be no doubt that John Jackson took an estate for life, James a remainder \*658] in tail, and George the remainder in fee upon a certain contingency. That clearly would be the ordinary construction. But it is said, that, because the testator had estates which were not within the statute *De Donis*,—assuming that there is no custom to entail within the manor of Knaresborough,—the will is to bear a different construction. [*WILLIAMS*, J.—We must put a different construction upon the words “without leaving lawful issue,” in the case of leaseholds.] There is no authority for saying that those expressions are to be construed one way in the case of freehold and another way in the case of copyhold lands. In *Purefoy v. Rogers*, 2 Saund. 380, 388, Lord Chief Justice Hale says, that, “where a contingency is limited to depend on an estate of freehold which is capable of supporting a remainder, it shall never be construed to be an executory devise, but a contingent remainder only, and not otherwise.” [*WILLIAMS*, J.—If the prior estate be an estate in fee, the subsequent estate can only be an executory devise, as Mr. *Manisty* contends.] In *Doe d. Mussell v. Morgan*, 3 T. R. 763, where A. devised to B. for life, remainder to C. for ninety-nine years if he should so long live, remainder to the heirs of the body of C.,—the remainder to the heirs of the body of C. was held a contingent remainder and not an executory devise, and was defeated by C.’s surviving B., there being no preceding estate of freehold to support it. Lord Kenyon, in giving judgment, there says: “If ever there existed a rule respecting executory devises which has uniformly prevailed without any exception to the contrary, it was that which was laid down by Lord Hale in the case of *Purefoy v. Rogers*, that, ‘where a contingency is \*659] limited to depend on an estate of freehold, which is capable of supporting a remainder, it shall never be construed to be an executory devise, but a contingent remainder only, and not otherwise.’ Now, that rule applies to and must govern the present case.” The judgment of Tindal, C. J., in *Doe d. Simpson v. Simpson*, 4 N. C. 333 (*E. C. L. R.* vol. 33), 5 Scott 770, fully bears out this contention. [*WILLIAMS*,

(a) The points marked for argument on the part of the defendant were as follows:—

“1. That there is sufficient evidence set out in the case to prove the existence of a custom to entail within the manor of Knaresborough, and that, consequently, James Jackson took an estate tail under the will of George Jackson the elder, with a remainder to George Jackson the younger, and that the estate tail was barred by the surrender of James Jackson:

“2. That, even if the custom to entail is not proved, and James Jackson took a fee simple conditional, still that the devise over to George Jackson the younger was an ineffectual remainder, and not a good executory devise:

“3. That the devise over to George Jackson, whether an executory devise, or a remainder, was barred by the surrender of James Jackson.”

J.—The result of the decision in that case is this, that, though the words of the devise, if they had stood alone, would have given a fee to the first taker, yet, inasmuch as there was a gift over in case of his dying without issue, the result would have been, if the subject of the devise had been freehold, to qualify the gift and make it an estate tail, but, being copyhold, to which the statute De Donis did not apply, it became a fee simple conditional. That is all the Court meant to decide. BYLES, J.—If this had been a will made before the statute De Donis, it would have given the first taker a fee simple conditional: and, as copyholds are not within that statute, the result must be the same.] That is the effect of the devise, not the construction of it. *The Earl of Stafford v. Buckley*, 2 Ves. sen. 170, was exactly like the case supposed. It was there held that an annuity in fee granted by King Charles the Second out of Barbadoes duties was not within the statute De Donis: therefore, being settled on A. “and the heirs of her body,” it was held to amount to a fee simple conditional at the common law, the remainder over being void; and that A., having had issue, might bar the possibility of reverter. It is not because it is a void remainder that it is to be construed as an executory devise: *Brownsword v. Edwards*, 2 Ves. sen. 248. In construing a will, the Court will not make any distinction between freehold and copyhold, though they will as between freehold and leasehold. An illustration of this principle is to be found in *Roe d. Crow v. \*Bald-* [\*660 were, 5 T. R. 104, 111, where Lord Kenyon says: “A distinction has been taken by the plaintiff’s counsel between the operation of a common recovery respecting copyholds and freeholds. But it would lead to perplexity if different rules were applied to different sorts of estates. Copyhold estates are neither within the statute De Donis (13 Ed. 1, c. 1), or that of Uses (27 H. 8, c. 10): neither, indeed, are they the subject of entails, unless there be a custom in the manor to warrant it. It was in conformity to the rule respecting real estates, and to prevent any estate being unalienable, that the same rule was adopted in the case of copyholds as a mean of unfettering estates, and to prevent perpetuities. And I know of no authority which makes any distinction in this respect between copyholds and freeholds.” And see *Martin d. Tregonwell v. Strachan*, 2 Str. 1179, a MS. note of which is given in 5 T. R. 107. The limitation here is repugnant. It cannot be an executory devise; it cannot take effect until after the death of James Jackson without issue, that is, after the expiration of the preceding estate.

The real question is, whether, by the customs of this manor, there may be a limitation of lands after a fee simple conditional. The donee of a fee simple conditional may alien after having had issue, so as to defeat those in remainder. In Co. Litt. 19 b, it is said: “If the King before the statute of Donis Conditionalibus had made a gift to a man and to the heirs of his body begotten, the donee post prolem suscitatum might have aliened, as well as in the case of a common person. But, if the donee had no issue, and before the statute had aliened with warrantie, and died, and the warrantie had descended upon the King, this should not have bound the King of his reversion without assets; but otherwise it was in the case of a \*common person.” Again, p. 60 a, it is [\*661 said: “By the opinion of Littleton, as there may be an estate-tail by custome, with the co-operation of the Statute of Westminster

2, c. 1, so may he have a formedon in descender; but, as the statute, without a custome, extendeth not to copyholds, so a custome without the statute cannot create an estate taile. Now, it is not a sufficient prooffe that lands have been granted in taile: for, albeit lands have antiently and usually beene granted by copie to many men and to the heires of their bodies, that may be a fee-simple conditional, as it was at the common law. But, if a remainder have been limited over such estates, and enjoyed, or if the issues in taile have avoided the alienation of the ancestor, or if they have recovered the same in writs of formedon in the descender, these and such like be proofes of an estate taile. But, if by custome copyhold may be entailed, the same by like custome by surrender may be cut off: and so it hath been adjudged." There is abundant proof of a custom in this manor to alien before issue, and to limit a remainder after a fee simple conditional: and there is no instance of the donor having ever entered for that cause. There are instances of enjoyment by remainder-men: but no instance where the donee has aliened after issue, or with a recital that he had issue. In Co. Litt. 52 b, it is said: "A custome within a manor time out of mind used, was, to grant certaine lands parcel of the said manor in fee-simple, and never any grant was made to any and the heirs of his body for life or for years; and the lord of the said manor did grant to one by copie for life, the remainder over to another and the heires of his body; and it was adjudged that the grant and remainder over was good; for, the lord having authoritie by custome, and an interest withall, might grant any lesser \*662] estate; for, in this case, the custome that \*enableth him to the greater, enableth him to the lesser,—Omnis majus in se continet minus." That a custom to surrender a copyhold to the use of one for life, with remainder in tail, is good, is clear from the case of Stanton v. Barnes, Cro. Eliz. 373. The question is, whether there may not be a limitation on that. And see Doe d. Edmunds v. Llewellyn, 2 C. M. & R. 503. The alleged customs set out in customary A. (antè, p. 611) are expressly limited to lands within the forest: and they differ in many important particulars from those contained in customary B. (antè, p. 617). For instance, the 25th clause of the former, is, that, if any tenant be seised of any customary lands, and have issue divers daughters, they being not married at the time of the death of their ancestor, *the eldest daughter shall have the land*; whereas, by clause 5 of the latter, it is said, that, in such a case, *the daughters shall inherit the lands according to the course of the common law*: and the case finds the custom to be so, —p. 621. Customary B. is a singular document. It is not entered on the Court rolls of the manor. It purports to have been framed in pursuance of a commission; but it is difficult to see what authority the Prince of Wales had to issue such a commission: and it manifestly is not a complete statement of the customs of the manor; and it is shown upon the face of the case to be in many particulars at variance with the customs which are admitted to prevail there. And, as to customary C., —antè, p. 620,—that does not even purport to contain the customs of the manor; it is a mere partial and incorrect statement of some of the customs. [BYLES, J.—Is not this customary admissible on the principle relied on in Crease v. Barrett, 1 C. M. & R. 919,† 5 Tyrwh. 458, viz., as statements of deceased persons as to matters in the nature of public

rights, which they have no interest to misstate?] It clearly [\*663  
 \*cannot come within that rule. Some reliance was placed upon  
 an admission contained in the special verdict in *Doe d. Blesard v. Simpson*  
 3 M. & G. 929 (E. C. L. R. vol. 42); 3 Scott N. R. 774. But that ad-  
 mission cannot influence the decision of the Court here. In the first  
 place, there was no motive for controverting it; and it had no bearing  
 upon the decision the Court came to. Besides it was long after the  
 controversy as to the custom arose: see *Rex v. Cotton*, 3 Campb. 444,  
*The Berkeley Peerage Case*, 4 Campb. 401, 417, *Freeman v. Phillipps*,  
 4 M. & Selw. 486, *Gee v. Ward*, 7 Ellis & B. 509 (E. C. L. R. vol. 90).  
 [BYLES, J.—As to this being a mere finding on the admission of the  
 parties, it is to be observed that a judgment by default is evidence as  
 well as a judgment in a contested suit.] The admission is of no value.  
 The defendant had no interest in contesting the fact: his estate was  
 barred by the surrender,—*Carr d. Dagwell v. Singer*, 2 Ves. sen. 603;  
 and a comparison of the documents referred to in this case, will show that  
 the admission is contrary to the fact. *Bilton's Case*, antè, p. 627, is  
 a very strong one: there, William Turner and Sarah his wife, in 1716,  
 being donees of a fee simple conditional, alien in fee. In *Lightfoot's*  
*Case* and *Coghill's Case*, antè, p. 632, likewise, there are limitations in  
 fee after a fee simple conditional. Mr. Watkins's suggestion (1 Watk.  
 Copyh. 218), that an entail of copyholds may be effected by means of a  
 trust, where the customs of the manor do not warrant an entail of the legal  
 estate, is successfully combated by the learned editor of the fourth edi-  
 tion. Trusts follow the legal limitations; and the trust estate of a copy-  
 hold can in no case be capable of an entail where the legal estate is not:  
*Garth v. Baldwin*, 2 Ves. sen. 646, 655; *Radford v. Wilson*, 3 Atk.  
 815; *Pullen v. Middleton*, 9 Mod. 483. *Collins's Case*, antè, p. 637,  
 and *Cant's Case*, antè, p. 640, also fully support the \*defendant's [\*664  
 contention. In 2 *Jarman on Wills*, 2d edit. 423, 3d edit. 472,  
 it is said: "In ordinary language, when a testator gives an estate to a  
 person and his heirs, with a limitation over in case of his dying without  
 issue, he means that the devisee shall retain the estate if he leaves issue  
 surviving him, and not otherwise; and, where the phrase is, in case the  
 first taker die *before he has any issue*, or *if he have no issue*, the inten-  
 tion probably is, that the estate shall belong absolutely to the devisee,  
 on his having issue born. But the established legal interpretation of  
 these several expressions is different; for, it has been long settled  
 (though the rule, it will be remembered, now applies only to wills made  
 before the year 1838) that words referring to the death of a person  
 without issue, whether the terms be '*if he die without issue*,' '*if he have*  
*no issue*,' or '*if he die without haviny issue*,' or '*if he die before he has*  
*any issue*,' or '*for want*' or '*in default of issue*,' unexplained by the  
 context, and whether applied to *real* or to *personal* estate (notwithstand-  
 ing the distinction taken between these two species of property in some  
 of the early cases), are construed to import a *general indefinite failure*  
*of issue*, i. e. a failure or extinction of issue *at any period*. This rule,  
 however, admits of two exceptions: the first is, where the phrase is,  
*leaving no issue*; with respect to which the settled distinction is, that,  
 applied to *real* estate, it means an indefinite failure of issue, but, in  
 reference to *personal* estate (and chattels real, and also real estate  
 directed to be converted, are for this purpose regarded as personalty), it

imports a failure of issue *at the death*. The other exception to be noticed to the general rule, is, where a testator, *having no issue*, devises property in default or on failure of issue *of himself*; in which case it \*665] is considered that the evident object of the testator is simply to \*make the devise contingent on the event of his leaving no issue *surviving him*, and that he does not refer to an extinction of issue at *any time*." Doe d. Simpson v. Simpson decides that there is no difference in this respect between freeholds and copyholds. Slingsby's Case, *antè*, p. 642, affords no argument against the defendant. But Bowen's Case, *antè*, p. 644, is much in his favour. There, there is an instance of an admittance to an estate tail, which was barred under the 3 & 4 W. 4, c. 74. An admittance cannot qualify or enlarge the surrender. In Doe d. Mason v. Mason, 3 Wils. 63, a single admittance to a copyhold was held to be evidence to prove the custom of a manor for lands to descend to the youngest nephew. So, in Roe d. Bennett v. Jeffery, 2 M. & Selw. 92, a single instance of a surrender in fee by tenant in special tail of a copyhold estate was held to be evidence to prove a custom within the manor to bar entails by surrender, though the surrenderor had not been dead twenty years, and though one instance were proved of a recovery suffered by tenant in tail to bar the entail. In Doe d. Stilwell v. Mellersh, 5 Ad. & E. 540 (E. C. L. R. vol. 31), 1 N. & P. 30, a single instance was held sufficient evidence of a custom for the clerk of the manor to take surrenders, as well as the steward. And in Doe d. Askew v. Askew, 10 East 520, it was held that entries on the rolls of a manor Court of admissions of tenants in remainder after the determination of the estate of the last tenant's widow, who held during her chaste viduity, were evidence of a custom for the widow to hold on that condition, so as to maintain ejectment against her as for a forfeiture, on proof of her incontinence, although there were no instances in fact stated on the rolls, or known, of such a forfeiture having been enforced.

\*666] *Manisty*, Q. C., in reply.-- The true construction of \*the will is, to give James Jackson an estate tail in the freeholds and a fee simple conditional in the copyholds; and there is no objection to the limitation over on the score of remoteness. All the leading authorities are collected in the argument of Sir William Follett in Doe d. Simpson v. Simpson, 3 N. C. 339, 340 (E. C. L. R. vol. 32). Bilton's Case, *antè*, p. 627, might raise some doubt; but a surrender, without admittance, is no evidence of the custom. [ERLE, C. J.—It is a datum that there is no admittance of a tenant in tail on the roll.] In Coghill's Case, *antè*, p. 632, there was an attempt, by adopting the suggestion of Mr. *Watkins*, to create an equitable estate tail. The strongest case against the plaintiff is probably Collins's, *antè*, p. 637, where the parties professed to deal with property in the forest and in the manor in the same way: but there again trustees were interposed. But Slingsby's Case, *antè*, p. 642, shows, that, if there were a custom in this manor to entail, the person who was admitted in fee ought to have been admitted to an estate tail. The customary C. was clearly admissible, coming, as it did, from the proper custody. [ERLE, C. J.—It does not avail much: it shows certain fines on surrenders and admittances, and none for an admittance to an estate tail.] Its object probably was, to show the sources of the revenue of the duchy. And it agrees with customary B.

in all essential particulars. In *Denn d. Goodwin v. Spray*, 1 T. R. 466, a customary of a manor, appearing to be of great antiquity, and delivered down with the Court rolls from steward to steward, although not signed by any person, was held to be good evidence to prove the course of descent within the manor. *Chapman v. Cowlan*, 13 East 10, and *The Earl of Carnarvon v. Villebois*, 13 M. & W. 313,† are to the same effect. Assuming that there was some evidence of such a custom as that contended for, it was abundantly overbalanced and extinguished by the contrary evidence.

\*ERLE, C. J.—I am of opinion that the plaintiffs are entitled to our judgment on this special case. The question turns upon [\*667 the construction of a devise in the will of George Jackson, made in the year 1814, whereby the testator gives an estate for life to his nephew John Jackson, and, after his decease, to his great-nephew James Jackson, son of the said John Jackson, and the heirs male of his body; with a proviso, that, in case the said James Jackson should depart this life without leaving issue male of his body lawfully begotten him surviving, then he gave and devised all his said real estate from and after the decease of the said John Jackson and James Jackson, which should last happen, unto his nephew George Jackson, son of his late brother Samuel Jackson, his heirs and assigns, for ever. Now, it appears to me, that, unless there is a custom in the manor of Knaresborough to entail copyholds, the proper construction of this devise is, to give the nephew John an estate for life, and to the great-nephew James a conditional fee simple, with an executory devise in favour of George, in the event of James dying without leaving issue male of his body him surviving. I take it to be quite clear that it would be a conditional fee simple in James, unless there is a custom in the manor to entail copyholds, with an executory devise over in favour of George,—too remote if it was to be on a general failure of issue male of James, but not too remote if it was to take effect at the death of James provided there was no issue male him surviving. The present case appears to me to be distinguishable from *Doe d. Blesard v. Simpson*, 3 M. & G. 929 (E. C. L. R. vol. 42), 3 Scott N. R. 774, which related to the right to property in this same manor, because there the executory devise was too remote, depending on a general failure of issue; here it is to take effect on failure of issue male at the death of the \*first taker. The question, therefore, [\*668 is reduced to this, whether there is within the manor of Knaresborough a custom to entail. I have looked in vain for direct affirmative evidence of such a custom. Three customaries are referred to in the case. As to the first, which relates to the forest of Knaresborough, there is a direct finding that there is no custom to entail copyholds in the forest. As to the other two, which relate to the honor and manor of Knaresborough, there is no mention of any custom to entail; and there is a detail of the fines to be paid upon surrenders and admittances to the several descriptions of estates within the manor, but in neither of them is there any mention of an estate tail, or of any fine payable on admittance to an estate tail. As far, therefore, as these customaries go, they do not raise the inference of a custom to entail; but, on the contrary, they tend in some degree to raise a presumption the other way. If such a custom did exist, one would expect to find upon the Court rolls of the manor instances of tenants in tail being admitted: but,

although there are instances of copyhold tenants who by their wills have exhibited a strong desire to entail their estates, it is remarkable that not a single instance can be found of any person being *admitted* tenant in tail to any copyhold within the manor. And I find that the question whether there was a custom to entail in this manor was a material question to be disposed of in *Doe d. Blesard v. Simpson*; and there a special verdict was agreed on between the parties, and in that special verdict it is stated that "there is an express custom within the *forest* of Knaresborough prohibiting the entail of lands within the forest; but there is, no such express custom within the said manor. There is, however, no custom within the manor enabling the entail of copyhold, and the customs of the manor are considered by the tenants and steward, and \*669] \*for the purposes of the trial were admitted, to be the same in this respect as in the forest." The defendant was bound to make out the affirmative: but the matters I have referred to are extremely strong to lead to the conclusion that no such custom does exist. The only evidence tending the other way, is, that copyholders of the manor have in some instances by their surrenders endeavoured to create estates tail,—leaving property to a tenant for life, with a remainder over, which, if the lands were freehold, would operate to give an estate tail. These instances show a desire so to deal with the property, but a desire which seems never to have been realized by an admittance. No doubt that is open to the observation that those parties were under an impression that they could entail. Mr. *Bliss* is entitled to the benefit of that argument, on the part of the defendant. But I think Mr. *Manisty* was entitled to the answer he gave, as to some of these surrenders, viz., that an opinion at one time existed, and was sanctioned by the eminent name of Mr. *Watkins*, in his work on Copyholds, that an entail might be created of copyholds devised in trust: and some of the instances of surrenders mentioned in the case were to operate by creating a trust estate. Some of those instances certainly upon a cursory examination would seem to raise a presumption that the surrender operated in some way so as to make the remainder over valid as a remainder. They are not decisive of the point. They are all capable of being explained by certain suppositions of fact: and they occurred more than a century ago. At the utmost they raise a presumption; but they are all capable of being explained away, and are by no means decisive as to the existence of the alleged custom. The strongest case is that of *Collins*, where part of the \*670] property was situate in the forest of Knaresborough and \*part in the manor, and, taking under one and the same will, different parties take the property, one taking that which was within the forest as if there was no custom to entail, and another taking the property which was within the manor of Knaresborough in a way which was consistent with the supposition that there was a custom within the manor to entail. That is undoubtedly the strongest case: and I must confess I paused upon it a good deal. We are here performing the functions of a jury,—weighing the evidence as a jury would weigh it. And I am of opinion that the balance of evidence preponderates decidedly in favour of there being no custom in the manor of Knaresborough to entail copyhold lands. The result is, that, in my opinion the plaintiffs are entitled to succeed in this ejectment.

WILLIAMS, J.—I am entirely of the same opinion. The great question

which arises here, is, whether there is sufficient evidence that a custom exists in this manor to create estates tail. The burthen of proving that lies upon the party who is seeking to set up that custom. For the reasons given by my Lord, and which I do not think it necessary to repeat, I entirely concur with him, that, sitting as we are here, exercising the duties and functions of a jury, there is not enough to warrant us in point of fact in coming to the conclusion that the custom alleged by the defendant to create estates tail in the manor of Knaresborough has any existence. That being so, it remains to consider what is the effect of the first limitation in the will of George Jackson. After the first estate for life, the limitation is, to James Jackson, son of John Jackson, and the heirs male of his body. Now, it is impossible to deny that that limitation, by reason of the statute *De Donis* not applying to copyholds, carries \*only a fee simple conditional, just as a [\*671 similar limitation of freeholds would have operated before the passing of that statute. There is, then, a clear devise to James Jackson of a fee simple conditional. That being so, the question is, what effect is to be given to the limitation which follows, viz., that, "in case the said John Jackson should happen to depart this life without leaving issue male of his body lawfully begotten him surviving, I give and devise all my real estate unto my nephew George Jackson." It is contended by Mr. *Bliss*, on the part of the defendant, that this limitation may operate by way of contingent remainder, and, that being so, the proper steps had been taken to bar that limitation. But I am clearly of opinion that it is impossible, consistently with the rules of law which have been established now for several centuries, to treat this as a remainder. It was established in the time of Lord Coke, that, where a testator devises a fee, but with a limitation over on the happening of a given event, that cannot take effect as a contingent remainder, because it is an established rule of law that a fee cannot be limited upon a remainder. And Lord Coke,—*Co. Litt.* 18 a,—puts a case which is very analogous to the present,—“So, if lands are given to D. and his heirs so long as J. S. or the heirs of his body shall live, the remainder is void, because the first taker has a fee, though a base or determinable one.” It is true that Vaughan, C. J., in *Gardner v. Sheldon*, *Vaugh.* 269, doubts the authority of that dictum of Lord Coke. But, in Serjt. Williams’s notes to the case of *Purefoy v. Rogers*, 2 *Wms. Saund.* 388 a, it is said that that passage in *Co. Litt.* is good law, notwithstanding the doubts expressed by Chief Justice Vaughan. It is plain, upon all the authorities, that this limitation over, being a limitation over after a fee, though a determinable one, cannot operate as a \*remainder. The ques- [\*672 tion, then, is, whether it can operate as an executory devise. It seems to me that it can. It has long been settled, that, where the contingency upon which the limitation over after a fee is to take place, must happen within such a time as that the estate devised would not be rendered more inalienable than an estate limited by way of remainder in a deed would be, effect may be given to such a limitation under the name of an executory devise: but then that is coupled with the condition which I have just mentioned, viz., that it shall not be too remote within the rule as to the remoteness of limitations. Therefore, if upon the proper construction of this will, the devise over was not to take effect until after an indefinite failure of issue, the limitation could not be sup-

ported as an executory devise, by reason of its remoteness. But here, the words, instead of being, as in *Doe d. Blesard v. Simpson*, words which, according to the doctrine first established by Lord Macclesfield in *Forth v. Chapman*, 1 P. Wms. 663, imported an indefinite failure of issue, and made the executory devise bad as being too remote, the language of the devise points expressly to a failure of issue living at the death of James Jackson, and consequently the contingency must be determined at his death, and so the remainder over is not void on the ground of remoteness. Numerous authorities ever since the case of *Pells v. Brown*, Cro. Jac. 590, have established that this is an executory devise.

WILLES, J.—I am of the same opinion. It appears to me that the onus resting upon the defendant to establish a custom in this manor to entail, that onus has proved too much for him, and that there is not sufficient evidence before us to sustain the affirmative of the proposition. \*673] Agreeing, as I do, with my Lord \*and my Brother Williams, I forbear to repeat the reasons which they have already given, and better than I could. With respect to the second question, no doubt it is an important one. At first sight, it should seem that the reasoning in *Doe d. Blesard v. Simpson*, 3 M. & G. 929 (E. C. L. R. vol. 42), 3 Scott N. R. 774, may have established that the limitation under which the plaintiffs claim cannot be sustained by way of remainder, because a remainder cannot be limited after a fee. So, on the other hand, it cannot be sustained as an executory devise, because, if read as creating an estate tail with respect to freehold land, the limitation would be in effect a contingent remainder. It is argued that it ought not to be read in the other sense, simply because the estate tail is a conditional fee, and that by reason of the judgment in *Doe d. Blesard v. Simpson*. But I apprehend, for the reasons given by my Brother Williams, *Doe d. Blesard v. Simpson* has no application. *Doe d. Blesard v. Simpson* was a case in which, reading the whole will, the words, “if he shall die leaving no children” referred to an indefinite failure of issue. The clear meaning of this will is, and the case is consistent with reference to the authorities, taking those words with the other words, the will calling them “children” means “issue,” and that “leaving no children” means “without issue.” The clear meaning of the will in that case was, that the limitation was to take effect in case of an indefinite failure of issue; and it could not take effect as a remainder, for the reason already stated, viz., that there cannot be a remainder after a fee; and it could not take effect by way of executory devise, also for the reason already stated, viz., that it would be contrary to the rule against perpetuity. An executory devise must take effect within certain limits: and the \*674] executory devise, if it was to take effect here, must take \*effect beyond those limits, and therefore it fails by reason of the rule against perpetuity. Now, look at the words of the devise in this case. After giving that which would be an estate tail if applied to freehold, but which must be taken to be a conditional fee when applied to lands to which the statute *De Donis* (13 Ed. 1, c. 1), does not apply, the will goes on,—“Provided always, that, in case the said James Jackson shall happen,”—it is introduced by a word showing that it does not refer to a mere failure of issue,—“to depart this life without leaving issue male of his body, lawfully begotten, him surviving.” Now, these are words

which you find in many cases referred to in Jarman on Wills as expressing the same thing as if the testator had said, "if he shall die leaving no children living." That, therefore, points to an event which must take place within the limit of time within which the executory devise arises and comes into effect. The words are the very words which the Court of Common Pleas and the Exchequer Chamber, in *Doe d. Simpson v. Simpson*, 4 N. C. 333 (E. C. L. R. vol. 32), 5 Scott 770, and *Doe d. Blesard v. Simpson*, 3 M. & G. 929 (E. C. L. R. vol. 42), 8 Scott N. R. 774, were called upon by counsel to read into the document, but which they refused to do, and which, it was assumed in that case, if read into the will, would have made the limitation valid by way of executory devise. The very first thing one learns upon this subject, is, that, if you can construe a limitation as a contingent remainder, you shall not construe it as an executory devise: but, looking, as we must do, at the surrounding circumstances, and taking them into consideration, we cannot construe this limitation as a contingent remainder, and therefore we must construe it as a valid executory devise; and, consequently, the plaintiff is entitled to our judgment.

\**BYLES, J.*—I am entirely of the same opinion. Everything I could have said has been anticipated by the other members of the Court: therefore I decline to say more. [\*675]

Judgment for the plaintiffs.(a)

(a) The judgment was taken in the name of the devisee.

## THE SOUTH WALES RAILWAY COMPANY v. REDMOND May 31.

The plaintiffs, a railway Company having a branch terminating at Milford Haven, declared upon a contract whereby the defendant undertook to provide a suitable steam-vessel to run between that place and Dublin and Cork for the conveyance of passengers, goods, &c., in connection with the railway; and alleged for breach, that the defendant provided a vessel which was unseaworthy and a master who was incompetent, whereby certain pigs and cattle intrusted to them for carriage were damaged and lost.

Plea, that the agreement mentioned in the declaration was entered into contrary to and in violation of the purposes for which the plaintiffs' Company was incorporated, and was one which the Company could not lawfully enter into, and was void:—

Held, that there was no illegality of contract apparent on the face of the declaration,—the contract as set out being strictly in furtherance of the objects of the Company's incorporation; and that the plea afforded no answer.

THIS was an action for the breach of an agreement.

The first count of the declaration stated, that the plaintiffs were the owners of, and carriers of goods, passengers, and other traffic over, a railway called the South Wales Railway, to wit, from Grange Court and other places and stations upon the said railway to Neyland on Milford Haven, and from Neyland on Milford Haven to Grange Court and such other places and stations, and the plaintiffs were desirous of making arrangements whereby goods, passengers, and other traffic passing over and upon their railway to Neyland on Milford Haven, and intending and destined to proceed to Cork and Dublin respectively, and coming from Dublin and Cork respectively to Neyland on Milford Haven, and intending and destined to proceed from thence to places and stations on their said railway, might be carried by

sea between Cork and Neyland on Milford Haven, and between Dublin and Neyland on Milford Haven, respectively, in and by a steamer running in connection with the trains on their \*said railway, and \*676] might be respectively booked, invoiced, and consigned throughout; and thereupon, by certain heads of agreement made between the plaintiffs and defendant, dated the 23d of July, 1856, it was agreed between them (among other things) as follows,—“1. The steamboat ‘Troubadour,’ belonging to Mr. John Edward Redmond, lately plying between Bristol and Liverpool, or some other suitable steam-vessel, to be placed by him as from the 28th day of July instant, on the station between Dublin and Milford Haven and Cork, and to be worked by him for the conveyance of passengers, parcels, cattle, and goods, regularly, punctually, and efficiently, unless prevented by accident, or by some similar unforeseen circumstance, in connection with the South Wales Railway at Neyland on Milford Haven, and to the reasonable satisfaction of the Company, and so as to perform in each week one trip each way between Milford Haven and Dublin, and in the same week one trip each way between Milford Haven and Cork. 2. All such traffic as above mentioned going by the steam-vessel and along the South Wales Railway or any part of it, or vice versa, and which is here designated the through-traffic, shall be booked through by Mr. Redmond and the Company respectively, and the said parties shall mutually afford all proper and reasonable facilities for carrying on such through-traffic, and for encouraging and extending the same. 9. This agreement, and the service and through-traffic arrangement here contemplated, to continue in force for the period of one year, with power to Mr. Redmond to determine this agreement at the end of the first six weeks thereof; with power also for the Company or Mr. Redmond to determine the same at any time after such six weeks, on giving four weeks’ previous notice in writing to the other of their or his intention so to do:” Averment, that the said Mr. John Edward Redmond is the defendant, and \*677] that, in \*pursuance of the above agreement, the defendant placed the said steamer “Troubadour” on the said station as described in the said agreement, and worked the same for the conveyance of passengers, cattle, goods, and other traffic between Cork and Neyland, and between Dublin and Neyland, in connection with the trains on the plaintiffs’ said railway: but that the defendant, though not prevented by any accident, or any similar unforeseen circumstance, did not regularly, punctually, and efficiently, or to the reasonable satisfaction of the plaintiffs, work the said steamer for the conveyance of the said traffic in connection with the South Wales Railway at Neyland on Milford Haven aforesaid, but, on the contrary thereof, despatched the said steamer on one of the trips or voyages to be made by her for the conveyance of such traffic as aforesaid in connection with the plaintiffs’ said railway, in an unfit and unseaworthy condition, and with an incompetent master; by reason whereof a large number of pigs, cattle, and other animals which had been received and invoiced by the agents of the plaintiffs at Cork, to be conveyed by the said steamer to Neyland on Milford Haven aforesaid, and to be there delivered over to the plaintiffs for carriage over and upon their said railway to places beyond Neyland, for reward to the plaintiffs, and which, in pursuance of the said agreement, were by the defendant received and taken on board the said steamer to be

conveyed to Neyland for the purpose and on the terms aforesaid, were during the said voyage or trip, as to a great part thereof, wholly lost and destroyed, and, as to the remainder, greatly damaged and injured; and, by reason and in consequence thereof, the plaintiffs were compelled to pay and did pay the said several consignors of the said pigs, cattle, and animals respectively large sums of money as and for damages for the same respectively \*having been so lost, destroyed, damaged, [\*678 and injured, and also large sums of money for the costs and expenses as well of themselves as of the consignees respectively, by them and the plaintiffs respectively necessarily and properly paid and incurred in and about several actions and suits brought against the plaintiffs by the said consignors respectively by reason of the premises, and otherwise.

The second count stated that the defendant also broke the said agreement in this, that, although the said agreement, and the service and through-traffic arrangement thereby contemplated came into force as before mentioned, and continued in force for the space of six weeks and upwards, and although the defendant did not determine the said agreement at the end of the first six weeks thereof, and neither the plaintiffs nor the defendant afterwards gave to the other of them four weeks' or any previous notice in writing of their or his intention to determine the said agreement; yet the defendant ceased to work the said steamer under the said agreement for the conveyance of passengers, parcels, cattle, and goods as therein mentioned, and wholly took away the said steamer from and ceased to run and work the same upon the said station between Dublin, Milford Haven, and Cork, whereby the plaintiffs were deprived of the benefit of the said service and through-traffic arrangement.

Fifth plea,—to the first and second counts,—that the contracts and agreements in those counts respectively mentioned, were respectively entered into contrary to and in violation of the purposes for which the plaintiffs' Company was incorporated; and that the said contracts and agreements were contracts and agreements into which the said Company could not lawfully enter, whereby the same were and are void and of no effect.

\*To this plea the plaintiffs demurred, the ground of demurrer [\*679 stated in the margin being, "that the plea raises only a question of law, and does not tender an issue of fact; and that, as matter of law, the contracts and agreements respectively were valid." Joinder.

*Lush*, Q. C. (with whom was *Phipson*), in support of the demurrer.(a) —The plea sets up nothing on which the plaintiffs could take issue, or which could be submitted to a jury. It is in effect the same as a demurrer to the declaration. The proposition for which the defendant means to contend is, that the plaintiffs cannot make a contract for the carriage of passengers and goods beyond their own line of railway. The Company, however, have nothing whatever to do with the working of the

(a) The point marked for argument on the part of the plaintiffs was as follows:—

"That the agreement set forth in the declaration, and as to which the first and second breaches are respectively assigned, was and is a good and valid agreement, and that the making thereof was within the powers of the Company,—being, in effect, an agreement with the defendant as carrier by sea for the taking on of traffic from, and the bringing of traffic to, the railway of the Company, passing or destined to pass over such railway or some part thereof, for the mutual convenience of the Company and the defendant."

steam vessel: all they contract for, is, that there shall be a vessel ready to take on their traffic. [WILLES, J.—Is there any recital in the South Wales Railway Company's Act as to the objects of its passing?] None which affects this question. [The Court called upon

*Honyman*, in support of the plea.—The declaration alleges that it was agreed between the Company and the defendant, *among other*  
 \*680] *things*, as therein \*stated. It does not profess to set out the whole. It does not show what were the real arrangements be-

tween the parties. It may be that by the agreement the defendant is guarantied by the Company against all loss from running the steamer between Dublin and Cork and Milford Haven, or guarantied a given amount of profit. The Company contract for the conveyance of passengers, cattle, and goods across the sea, far beyond the limits of their own lines, which terminate at Neyland on Milford Haven. Is not that a matter which is foreign to the objects for which the plaintiffs are incorporated? [ERLE, C. J.—If the Epsom Railway Company undertake to carry a parcel to York, would they not be responsible for its loss? The Great Western Railway Company contended that they were not responsible beyond their own lines; and the matter underwent considerable discussion in the Exchequer Chamber, in *Collins v. The Bristol and Exeter Railway Company*, 1 Hurlst. & N. 517.† There, the Great Western Railway Company received goods at Bath to be sent to the Torquay station, subject to a condition that the Company would not be answerable for loss or damage by fire, nor for loss or damage to goods beyond the limits of their railway. The goods were conveyed to Bristol, where the Great Western line ends and the Bristol and Exeter line begins. Whilst at the station of the Bristol and Exeter Company at Exeter, the goods were destroyed by an accidental fire. The Exchequer Chamber held that the Great Western Railway Company, having received the goods to be carried *on their line*, subject to the stipulation against loss by fire, discharged themselves by forwarding the goods to be carried by the defendants; and that, there being no evidence as to the terms on which the goods were to be carried on the defendants' line,  
 \*681] *they must be treated as having received them as* \*common carriers, and were subsequently liable for their loss. WILLES, J.—

The judgment of the Exchequer Chamber was reversed by the House of Lords, who held (a) that the contract was with the Great Western Company alone, and that the Bristol and Exeter Company was not liable. They refer to *Muschamp v. The Lancaster and Preston Junction Railway Company*, 8 M. & W. 421.† There, a parcel was delivered, at Lancaster, to the Lancaster and Preston Junction Railway Company, directed to a person at a place in Derbyshire. The person who brought it to the station offered to pay the carriage, but the book-keeper said it had better be paid by the person to whom it was directed, on the receipt of it. The Lancaster and Preston Junction Railway Company were known to be proprietors of the line only as far as Preston, where the railway unites with the North Union line, and that afterwards with another, and so on into Derbyshire. The parcel having been lost *after* it was forwarded from Preston—it was held that the Lancaster and Preston Railway Company were liable for its loss. Lord Chelmsford expressed an opinion that there was nothing in the special

(a) *The Bristol and Exeter Railway Company v. Collins*, 7 House of Lords Cases 194.

terms of the contract then before their lordships which excluded the application and authority of that case. "I think," he says, "that the contract was entire, was for the whole journey from Bath to Torquay, and was made with the Great Western Railway Company alone; that the goods were carried on the defendants' railway under the contract; and that the defendants are consequently either not liable at all, as no agreement was entered into with them, or that, if the contract in any way attaches to them, the exception as to loss by fire accompanies it, and exonerates them from liability." *Lush* referred to *Mytton v. The Midland Railway Company*, 4 Hurlst. & N. 615.†] In none of the cases has the illegality of the contract \*been set up. [*Lush*.— [\*682 It was in *Wilby v. The West Cornwall Railway Company*, 2 Hurlst. & N. 703;† but the Court held that it was not ultra vires for the Company to carry beyond their own line by sea or by coach or by any other line.] The question is, whether it is competent to the Company so to contract to carry. A Company which is established for one particular purpose has no right to apply the funds of its proprietors and subscribers to another and a totally different purpose. [ERLE, C. J.—Corporations have at law capacity to make all contracts not expressly or impliedly prohibited; and therefore contracts frustrating or necessarily inconsistent with the object for which a Company is incorporated by an Act, is impliedly prohibited by it: so held in *The Mayor, &c., of Norwich v. The Norfolk Railway Company*, 4 Ellis & B. 397 (E. C. L. R. vol. 82). WILLES, J.—And also by the House of Lords.(a) WILLIAMS, J.—The whole object of the Act of incorporation of this Company(b) was, to connect England and Wales with the Irish coast.] In *Colman v. The Eastern Counties Railway Company*, 10 Beavan 1, the directors of a railway Company, for the purpose of increasing the traffic, proposed to guaranty certain profits and secure the capital of an intended steam-packet Company, who were to act in connection with the railway: and it was held that such a transaction was not within their powers; and an injunction was granted to prevent them from carrying it into effect. So, in *The Shrewsbury and Birmingham Railway Company v. The North Western Railway Company*, 6 House of Lords Cases 113, it was held that specific performance by a corporate body of a contract as to matters which \*are ultra vires, will not be enforced. [\*688 The Lord Chancellor (Grenworth) there says,—p. 135: "When the legislature constitutes a corporation, it gives to that body *prima facie* an absolute right of contracting. But this *prima facie* right does not exist in any case where the contract is one which, from the nature and object of incorporation, the corporate body is expressly or impliedly prohibited from making: such a contract is said to be ultra vires." Then, this is a perfectly good plea in form. In *Ransford v. Copeland*, 6 Ad. & E. 482 (E. C. L. R. vol. 33), 1 N. & P. 671 (E. C. L. R. vol. 36), in assumpsit by the public officer of a Company, described in the declaration as carrying on the business of bankers in England according to the 7 G. 4, c. 46, the defendant pleaded that the Company carrying on business as in the declaration mentioned, consisted of more than six persons, and that they were illegally associated together and carried on such business for the purpose of borrowing and taking up in

(a) In *The Shrewsbury and Birmingham Railway Company v. The North Western Railway Company*, 6 House of Lords Cases 113.

(b) *Milford Haven Extension*, 15 & 16 Vict. c. cxvii.

England money on their bills and notes payable on demand or at less than six months from the borrowing, during the continuance of the privileges granted to the Bank of England by the 3 & 4 W. 4, c. 98. The plaintiff replied that the Company were not illegally associated together, nor did they carry on the said business for the purpose in the plea mentioned, in manner and form, &c. Issue having been joined thereon, it was held that the statement in the plea, of the Company being illegally associated, was a substantive allegation compounded of law and fact, and traversable; and therefore that the defendant was bound to prove, not only that the Company carried on business for the purpose of taking up money on bills or notes payable at less than six months, during the continuance of the Bank charter, but also the fact which rendered such business illegal, viz., that it was carried on within  
 \*684] sixty-five miles of \*London. Lord Denman, delivering the judgment of the Court, there says: "The plea does not state certain facts, and then go on to allege *whereby* the association was illegal, or any words to that effect; but contains a distinct and separate allegation that the association was illegal within the statute 3 & 4 W. 4, c. 98. It is plain, that, if it were so illegal, that illegality must arise from some fact, or the absence of some fact, either of which required to be established by proof; and such proof is necessarily matter for the consideration of a jury." Here, the plea alleges that the contracts in the declaration mentioned were entered into contrary to and in violation of the purposes for which the Company was incorporated, and such as the Company could not lawfully enter into, and were therefore void: and that is admitted by the demurrer to be true.

*Lush*, in reply.—The demurrer only admits those facts which are well pleaded. If the defendant meant to rely on illegality of the agreement, he should have set out that which he relies on as showing its illegality. There is no suggestion of any misappropriation of the funds of the Company. The contract being in writing, its construction is for the Court; whereas, the plea seeks to refer it to a jury. In *Ransford v. Copeland*, the particular illegality relied on was set out in the plea.

ERLE, C. J.—I am of opinion that the plaintiffs are entitled to judgment. The declaration sets out an agreement under which the defendant undertook to provide a steam-vessel for the conveyance of passengers, &c., brought to Milford Haven by the plaintiffs' railway, to and from that place and Dublin and Cork respectively. The first point which has  
 \*685] been \*contended for by Mr. *Honyman*, is, that the contract as set out is ultra vires and illegal,—the Company being incorporated for the purpose of working a railway, and it being self-evident that the contract relates to something beyond that purpose. I differ entirely from him. In all the cases that I am aware of, where the contract has been held to be illegal, the object to be effected was something wholly unconnected with the purposes of the incorporation. One of the earliest cases was that of the *Harwich Steam-packet Company*, *Colman v. The Eastern Counties Railway Company*, 10 Beavan 1, where it was held, that, as between the shareholders and the directors of the Company, the diversion of a portion of its capital to the support of a concern foreign to the objects of its incorporation was a breach of trust. But there the Company were in a given event to purchase the steam-vessels. An entirely different question, however, is raised in a Court of law when

it is alleged that the funds of the Company are applied to a purpose entirely unconnected with the purpose of its incorporation. In the present case, so far as I can see, this is not a contract which has for its purpose something entirely ultra vires. So far from a contract by this Company to facilitate the forwarding of passengers and goods to Ireland being illegal, I rather gather that the legislature contemplated and intended that a railway terminating at Milford Haven should forward traffic to and from Ireland, and therefore this contract would be entirely within the scope and object of the Company's incorporation or extension. As far as regards the declaration, therefore, to my mind there is nothing illegal disclosed upon the record. Then it is said that the plea discloses a good answer to the action, because it alleges that the contracts declared on in the first and second counts were entered into contrary to and in \*violation of the purposes for which the plaintiffs' Company was incorporated, and such as the Company could not lawfully enter into, and whereby the same were void. I take the meaning of the plea to be, that the contract set out in the declaration, as it there appears, is ultra vires. This is evidently the question intended to be raised. I do not think that mode of pleading is good. We cannot assume that there are undisclosed portions of the agreement which will sustain the plea. If there are, it was the duty of the defendant to bring them forward. I construe the plea as addressed to that which appears on the face of the declaration; and, so construed, it discloses no illegality, and is therefore bad. [\*686]

WILLIAMS, J.—I am of the same opinion. There is nothing on the record to show that the contract declared on is illegal by reason of its being foreign to the purposes of the incorporation of the Company, and so impliedly forbidden. I do not say that the employment of the funds of the Company in the way suggested by Mr. *Honyman* would be justifiable because in the result the Company might be thereby benefited. That would be too wide a proposition. But I consider the contract here stated, and that which was to be done under it, to be directly connected with the working of the railway and the objects of its extension, and therefore not ultra vires. Then it is said that the plea amounts to an assertion that there are other parts of the contract not set out in the declaration which would show it to be ultra vires. If the plea had so alleged, the question would have arisen whether it was not bad on general demurrer, or whether the plaintiffs might not have gone to a Judge at Chambers to amend the plea, on the ground that it was calculated to embarrass them. I think, therefore, we must \*take the plea to mean nothing so vague and untechnical, but merely to allege that the contract as already disclosed by the declaration is illegal and void. For the reasons given by my Lord, I think it is not so, and therefore that the plaintiffs are entitled to judgment. [\*687]

WILLES, J.—I am of the same opinion. All that the contract, as it appears on the face of the declaration, amounts to is this,—that the railway Company have bargained with the defendant to provide a means by which the passengers and goods carried by their line may be safely and speedily conveyed to and from Ireland. It is a mere arrangement as to the times at which the steam-vessel employed for the service shall start and arrive, and a stipulation that it shall be proper for the purpose. I cannot distinguish that in principle from the ordinary case of a rail-

way Company providing warehouses for the stowage of goods intrusted to them. It is one of the incidents to the due employment of the railway. I see nothing at all invalid in the contract. As to the plea, another question arises, on which it is necessary to give an opinion, viz., whether it is to be taken to allege that there is some fact not appearing upon the record by reason of which the contract declared on is invalid, and whether that constitutes a good plea on general demurrer; or whether we must not take the plea as alleging that the contract as declared on is illegal. For the reasons stated by my Brother Williams, I think we must take the plea as applying solely to that which already appears upon the record. If it means anything else, as at present advised, I should hold it to be a bad plea. It does not present matter to enable the Court to see whether or not there is such illegality as to \*688] afford an answer in point of law to the declaration. It is \*enough, however, to say that the plea is bad, there being nothing to show that the contract declared on is invalid.

BYLES, J., concurred.

Judgment for the plaintiffs.

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The Hon. MARY SIDNEY DOUGLAS, Appellant; The Right Hon. LIONEL WILLIAM JOHN, EARL OF DYSART, Respondent.  
*June 20.*

A custom that the lord of a manor, in assessing the fine upon admittance of one not being a copyhold tenant on the Court rolls (except a customary heir claiming admittance as such), is not restricted in amount to any number of years' value of the tenement to which such admittance is made, is unreasonable and bad.

THE following case was stated for the opinion of this Court under the provisions of the Copyhold Act, 1852, 15 & 16 Vict. c. 51, s. 8:—

The respondent is the lord of the manor of Petersham, in the county of Surrey. The appellant is a copyhold tenant of the said manor.

In the course of proceedings taken under the said Act for the enfranchisement of certain copyhold tenements of the appellant, held by her within the said manor, the following question arose, and was referred to Mr. Nathan Wetherell, the assistant commissioner, according to the provisions of the aforesaid section, viz., “What are the fines payable to the lord of the said manor on the admission to tenements held by copy of Court roll of the said manor?”

The assistant commissioner decided that the fines payable on admission to tenements held of the manor of Petersham by copy of Court roll are as follows, that is to say,—

\*689] “1. That, on the admission of the customary heir of \*any tenant of the manor, provided such heir claims admission as heir, but not otherwise, a fine is payable to the lord not exceeding in amount two years' quit-rents payable to the lord in respect of the tenement to which such admission is made:

“2. That, on the admission of any person then being a copyhold tenant on the rolls to any other tenement held of the manor, a fine is payable to the lord not exceeding in amount two years' quit-rents payable to the lord in respect of the tenement to which such admission is made:

"3. And that, upon the admission of every other person not being a copyhold tenant on the Court rolls (except such heir claiming admission as such as aforesaid), a fine arbitrary is payable to the lord in respect of every tenement to which such admission is made; and that, in assessing such fine, the lord is not restricted in amount to any number of years' value of the tenement to which such admission is made."

The appellant is dissatisfied with the decision of the assistant commissioner on the third point so decided by him. This decision is in accordance with and is grounded upon the custom of the manor: but the appellant contends, that that custom, viz. that the lord, in assessing the fine upon admission of every other person not being a copyhold tenant on the Court rolls (except a customary heir claiming admission as such), is not restricted in amount to any number of years' value of the tenement to which such admission is made, although it must be taken to exist in point of fact, yet is unreasonable, and therefore bad in law. And she further contends, that, if this be so, the decision complained of is wrong, and the lord cannot claim as a right the fines so decided to be payable to him, or to assess such fines without restriction.

The question for the opinion of the Court was,—\*Whether the said custom upon which the decision of the assistant commissioner [ \*690 on the third point decided by him was grounded, is in point of law good or bad?

*Montague Smith*, Q. C. (with whom was *R. E. Turner*), for the appellant.—The custom under which the lord claims on the admittance of a tenant a fine arbitrary not restricted in amount to any number of years' value of the tenement is bad. The history of these fines is given by Lord Loughborough in a note to *Grant v. Astle*, 2 Dougl. 724, where his lordship, after referring to 1 Roll. Abr. 507, *Jackman v. Hoddesdon*, Cro. Eliz. 351, *Hobart v. Hammond*, 4 Co. Rep. 27 b, *Willowes's Case*, 13 Co. Rep. 1, *Midleton v. Jackson*, 1 Chan. Rep. 18, *Popham v. Lancaster*, 1 Chan. Rep. 51, and *Morgan v. Scudamore*, 2 Chan. Rep. 70, thus concludes,—“It seems, therefore, to me much better for the interest of copyhold tenants, and for the public advantage, as there is a great deal of that property in the kingdom, that the fine to be paid upon the renewal of a copyhold estate should be strictly kept to that sum which has subsisted now (1781) above a century, namely, two years' improved value, without any deduction, except for quit-rents, which can hardly be called a deduction, for, the lord must allow that which he has received, or is to receive.” From that time downwards, the measure of reasonableness has been two years' improved value. The authorities are uniform. In *Holder d. Sulyard v. Preston*, 2 Wils. 401, *Wilmot*, C. J., says: “Copyholders, anciently, were little better than slaves, or the cattle upon the land: their tenure originally (most probably) was in villenage; by the help of reason, true religion, and science, we by degrees emerged from that state of barbarity; villenage \*became [ \*691 copyhold, but still the tenure was at the mere arbitrary will of the lord: at length copyholders got more permanent estates, like freeholds: anciently their lord might oust and turn them out when he pleased: his fines were arbitrary: but since we are become more civilized and free, the lord cannot at this day set a fine at more than two years' value upon an admittance on an alienation: admittance formerly

was of grace and favour; now it is of right: the lord took his fine for the admittance in nature of a relief; it was a boon for having admitted the tenant, and the admittance is the true parent of the fine, for he could have no fine without admittance:" Hobart v. Hammond, 4 Co. Rep. 28 a. In Wharton v. King, 3 Anstr. 659, 673, Macdonald, C. B., says: "The Courts seem to have considered it in this way. An estate of inheritance in a copyhold implies *vi termini* a right in the heir to come in, not dependent on the will of the lord. An arbitrary claim of unlimited fines is inconsistent with this right. The grant of such an estate must therefore have been accompanied with some agreement, fixing the limits of this claim of the lord. Where the fines have been variable, and no evidence of the actual agreement can be obtained from the practice or otherwise, it becomes necessary for the law to adopt some rules in ascertaining their mutual rights. The judges have therefore been obliged to consider what would have been a reasonable agreement for such parties to make; and to take that as the criterion of the supposed actual agreement, of which all other evidence is lost. In fixing what would have been a reasonable agreement, various considerations occur. By granting an estate of inheritance, the lord must be understood to have meant to confer a benefit. The fine reserved must therefore be less than the value of the admission; otherwise it would be in fact a purchase *toties quoties* \*for the full value. On the other \*692] hand, the fines paid must be referred to some right in the lord, and show that he did not part with the whole beneficial interest. After long struggles and several fluctuations, the Courts have at length fixed upon two years' value as being the fine most nearly approaching to the agreement which the parties probably made. That therefore is called a reasonable fine." So, in Lord Holles v. Hutchinson, 3 Swanst. 665, two years' value was held to be the proper fine. Reliance was placed, before the assistant commissioner, upon the case of King v. Dillington, Freem. Q. B. 494, where *five* years' value was said to be a reasonable fine, where nothing was payable except on the first purchase. Mr. Watkins refers to this case in 1 Watk. Copyh. 4th edit. 372, where he says: "In some manors, a person only fines upon his *first* purchase; as, if he purchase an acre of land, he shall pay a fine on his admission to it; but, if he purchase fifty acres afterwards, he shall pay no further fine. In such cases also the lord is not restrained to two or to seven years' value. So, in cases where the lord is not compellable to admit, but the admittance remains merely voluntary, as, on grants of escheated lands and the like; or, where they are grantable only for life, *without a right of renewal*, the lord is under no restriction whatever. In these cases he is under no obligation to grant at all: if he chooses to do so, he may fix his own terms; if the person wishing to become tenant does not care to accede to them, he is not necessitated to do so: no one is injured. These cases are not like those where the person soliciting admission has a legal right to succeed. Should the lord in those instances be left to impose his own terms, the person soliciting might be deprived of his inheritance or prevented from exerting that power of alienation \*693] which the law has now invested him with. Here, those \*reasons fail. The lord has a right to make the best bargain he can." Two years' value has been assumed to be the reasonable and proper fine in every case which has occurred since: see The King v. Boughey, 1 B.

& C. 565 (E. C. L. R. vol. 8) (*The King v. Meer*, 2 D. & R. 824 (E. C. L. R. vol. 26)); *Doe d. Twining v. Muscott*, 12 M. & W. 832;† *Wilson v. Hoare*, 10 Ad. & E. 236 (E. C. L. R. vol. 37), 2 P. & D. 659. These fines, like the general liens of bankers and carriers, and mercantile usage as to the days of grace on bills of exchange, and the like, have now become an inflexible rule of law. If this custom were held good, there is nothing to prevent the lord from claiming as much as ten years' value.

*Sir F. Kelly* (with whom was *Hannen*), for the respondent.(a)—The custom as alleged is absurd upon the face of it. But, if it means, that with reference to the other customs of the manor, the lord is to have an uncertain fine, to be assessed by the Court, but not limited to one or two or any number of years, it is submitted it may be a very good custom. The customs of this manor are peculiar. The fine uncertain must be a reasonable fine, but it is not limited as suggested. The manor of Ham, the Royal manor of Richmond, and three others in the county of Surrey, and two or three in other parts of England, have the same custom. On the admission of the customary heir, the lord's fine is not to exceed two years' quit-rents. These are 4*d.* per acre for land, and 6*d.* for a messuage. So, a tenant on the roll, who claims admittance to any other tenement, whether by purchase or descent, pays the same \*nominal fine. Having once paid a substantial fine, he has the [\*694 power of acquiring by purchase any other tenement, on payment of a mere nominal fine. A stranger comes in, and gets an estate in perpetuity,—why should he not pay a real fine? Is it reasonable, that, under these circumstances, the custom should be dealt with according to the ordinary rule of law? In *Scriven on Copyhold*, 4th edit. 319, it is said: "The rule by which the lord is precluded from insisting on more than two years' value for the fine of admission, would seem to be confined to those cases where he is compellable to admit, and the heir of the copyholder is subject to a fine on the devolution of the estate, and not to be applicable to voluntary grants, nor to cases where by the custom remainder-men must be admitted, or where the purchaser only, and not his heir, is subject to a fine, or where the fine on descent is nominal only; nor to cases where a fine is payable on the first purchase only within the manor, as in the manors of Harrow-on-the-Hill, Croydon, Lambeth, and Richmond; nor to copyholds for lives where there is no right of renewal, nor even to renewable copyholds for lives where the custom allows the copyholder to put in more than one life, for there each life is considered as a separate admission, and it would be unjust to the lord if it were otherwise, and quite an inconsistency, as a copyhold for lives would in that case be more valuable than a copyhold of inheritance, where the heir or devisee is subject to a fine on admission." The rule is thus stated in *Watkins*, 307 (4th edit. 371): "An uncertain fine is, where the quantum is dependent upon the will of the person imposing or assessing it. And it belongs of common right to the lord or his steward to assess it; but there may be a custom for the homage to do so. But, though the fine be regarded as arbitrary, it

(a) He protested against the power of the commissioner to state the case, and urged that it was highly inconvenient that he should have taken upon himself to do so without the assistance of the parties interested.

\*695] must nevertheless be, in \*most cases [in all cases, would perhaps be more accurate], a reasonable one. Should the lord be permitted to assess an unlimited fine, it would open a door to much oppression. He might use such a power for the purpose of disinheriting the heir. The law therefore has in many cases restricted him in his demands. In some manors, if the lord should be so exorbitant in his demand that the tenant cannot accede to it, he may have the fine assessed by the homage: but, if no such custom exists, the tenant may justify a refusal to pay it in many cases; and the reasonableness of it shall be determined on action brought. In cases where the lord is compellable to admit, and the heirs of the person so to be admitted would also be subject to fines on acceding to the estate, the fine must not exceed two years' improved value of the lands, without deducting land-tax, &c., except quit-rents. But, where a *purchaser* only is fineable, and not a person taking by descent, the lord shall not be restricted to two years, but may, if no custom be to the contrary, take four, five, or even seven years' value. In some manors, a person only fines upon his *first* purchase [as is the case here]; as, if he purchase an acre of land, he shall pay a fine on his admission to it; but, if he purchase fifty acres afterwards, he shall pay no further fine. In such cases also, the lord is not restrained to two or to seven years' value." [WILLIAMS, J.—If the question of reasonableness be for us,—as it would seem to be: see *Willowes's Case*, 13 Co. Rep. 1,—we will be guided by the rule which our predecessors have adopted.] If the lord confers an estate under such circumstances as that he disentitles himself in a great variety of cases to the ordinary fine, he admits to a tenement of greater value, and therefore it is but reasonable that he should have a larger fine.

\*696] \*WILLIAMS, J.—I cannot entertain any doubt in this case. If we were to answer the question put to us in the affirmative, we should be saying that a custom is good whereby the lord in assessing a fine is not restricted to any number of years' value. That is so plainly contrary to the rule which has been established so early as the time of Queen Elizabeth, that the custom must necessarily be bad. If the question had assumed another shape, viz., whether the custom may be good, if the amount be reasonable but fixed without reference to the ordinary rule of two years' limitation, the point might be arguable. But, as it stands, we must answer the question in the negative.

WILLES, J.—I am of the same opinion. Upon the materials presented to us on this case, it is impossible to say that this is a good custom.

Judgment for the appellant, with costs.

**\*DAVIES v. MARSHALL. June 5. [\*697**

The plaintiff complained in his first count of an obstruction of the light and air to his ancient windows; in the second count, of the raising and erecting of certain walls and buildings by the defendant, whereby the smoke and vapour from the plaintiff's chimneys were prevented from being carried off; and in the third count, that the defendant had deprived his house of the support which he was entitled to.

The defendant pleaded, by way of equitable defence, that the grievances in the declaration mentioned were occasioned by the pulling down and rebuilding of the defendant's house, that the plaintiff had notice of the premises, and that the old building was pulled down and the new one erected, and large sums of money were expended thereon by the defendant, with the knowledge, acquiescence, and consent of the plaintiff, and on the faith that the plaintiff so knew of, acquiesced in, and consented to the defendant's so pulling down and rebuilding as aforesaid. [By arrangement this plea was not to be relied on as a good plea of leave and license at common law.]

The plaintiff replied that the plaintiff acquiesced and consented as in the plea mentioned, upon the faith of certain false representations theretofore made to him by the defendant and her agents, that the grievances in the declaration contained would not result from or be produced by the said pulling down and rebuilding:—

Held, on demurrer to the plea, that it afforded a good defence on equitable grounds:

Held also, on demurrer to the replication, that it was a good equitable answer to the plea.

THE first count of the declaration stated, that, before and at the time of the committing by the defendant of the grievances thereafter mentioned, the plaintiff was possessed of a certain dwelling-house, with its appurtenances, and was entitled of right to have the light and air enter therein through divers windows in the said dwelling-house, for the convenient and wholesome use, occupation, and enjoyment thereof: yet that, before this suit, the defendant prevented and obstructed the light and air from entering through the said windows into the said dwelling-house as freely and fully as it ought to have done, by wrongfully erecting certain walls and buildings, and keeping and continuing the same, near to the said windows of the plaintiff, whereby the said dwelling-house had been and still was rendered dark and unwholesome and uninhabitable, and of less value; and the plaintiff had by means of the premises been obliged to expend and had expended large sums of money, in enlarging certain of the said windows and in opening other and additional windows, so as to obtain light and air for the proper enjoyment of his said dwelling-house as aforesaid, and in obtaining the advice of surveyors and other competent persons in respect of the premises; and also by \*reason of the premises it became and was impossible [\*698 for the plaintiff to reside in his said dwelling-house, and he was obliged to expend and did expend large sums of money in the hire of another dwelling-house, and in removing thereto; and had been otherwise greatly injured.

The second count stated, that, during all the times thereafter mentioned, the plaintiff was possessed of a certain dwelling-house, and its appurtenances, in and upon which were certain chimneys and chimney-pots which the plaintiff of right had always used and was then of right using, and still of right ought to use, for the convenient enjoyment and occupation of his said dwelling-house, and for carrying off the smoke and vapour therefrom, without any such interruption or disturbance from the defendant as was thereafter mentioned; and the defendant was during all the time aforesaid possessed of a house and premises adjoining and contiguous to the said dwelling-house of the plaintiff; and that the defendant, before this suit, wrongfully and unlawfully, and

against the will of the plaintiff, raised and erected certain walls and buildings in and upon her said house and premises, and carried the same high above the level of the said dwelling-house of the plaintiff, and thereby wrongfully and unlawfully interrupted the plaintiff in the use and enjoyment of his said right, and prevented the said smoke and vapour from being carried off from the plaintiff's said dwelling-house by means of the said chimneys and chimney-pots, as it otherwise might and would have been; and that, by reason of the premises, it became necessary for the plaintiff to expend and he did expend large sums of money in repairing the mischief so done to his said dwelling-house; and that, by reason of the premises, the plaintiff's said dwelling-house \*699] became and was rendered unfit for habitation \*and of less value, and the plaintiff sustained thereby the damage in the first count more particularly mentioned, and was otherwise greatly injured.

The third count stated, that, during all the times thereafter mentioned, the plaintiff was possessed of a certain dwelling-house, and of certain walls and buildings and certain chimneys thereon, which adjoined and were contiguous to certain walls, stables, and buildings of the defendant; and the plaintiff, during all such times, of right had enjoyed and still of right ought to enjoy the use and support of the defendant's said walls, stables, and buildings, for the maintenance, protection, and preservation of his said dwelling-house, and of his said walls and buildings, and of the said chimneys; and the plaintiff, during all the time aforesaid, was entitled to have the said walls, stables, and buildings of the defendant maintained and kept in their said position, so as to afford to the said dwelling-house, walls, buildings, and chimneys of the plaintiff such support, protection, and preservation as aforesaid: that, before this suit, the defendant wrongfully and unlawfully levelled and pulled down and removed the said walls, stables, and buildings of the defendant, and had since wholly refused to restore them to their former height and position, whereby the said dwelling-house, walls, buildings, and chimneys of the plaintiff were deprived of the support which they had hitherto of right enjoyed and still ought to enjoy; and the walls, floors, and ceilings of the said dwelling-house, and the said walls and buildings, and the said chimneys, were thereby cracked, shaken, and damaged, and rendered unsafe; and also, by reason of the removal of the said house, stables, and buildings, the rain penetrated through the walls of the said dwelling-house of the plaintiff, and destroyed and damaged the \*700] paper, furniture, and \*decorations in divers of the rooms thereof; and by reason of the premises the said dwelling-house of the plaintiff became and was for a long time damp and uninhabitable, and the plaintiff lost the use and enjoyment of the same, and was obliged to and did necessarily expend large sums of money, as in the first count mentioned, in providing another dwelling-house, and also in repairing and rendering safe the said dwelling-house, walls, buildings, and chimneys, and in replacing and restoring the paper, furniture, and decorations in the said rooms so damaged as aforesaid; and also by reason of the premises the said dwelling-house had been rendered less valuable.

Sixth plea, to the first three counts of the declaration, "for a defence on equitable grounds," that, before and at the respective times of the committing of the grievances in those counts mentioned respectively, the defendant was possessed of a certain messuage, with the appurte-

nances, and had occasion to and did pull down the said messuage for the purpose of erecting, and did erect, a certain other messuage in lieu thereof on the site of the said messuage so pulled down as aforesaid, with the appurtenances, and did expend large sums of money in so pulling down the said messuage and erecting the said other messuage as aforesaid: that the grievances in those counts mentioned respectively were, and were occasioned by, the pulling down of the said messuage and the erecting the said other messuage by the defendant as aforesaid, and continuing the same so erected as aforesaid, and that the plaintiff during all the times aforesaid always had notice of the premises thereinbefore in that plea mentioned respectively: and that she, the defendant, so pulled down the said messuage and erected the said other messuage, and expended the said sums of money in so pulling down the said messuage and erecting the \*said other messuage as aforesaid, [\*701 respectively, with the knowledge, acquiescence, and consent (a) of the plaintiff in that behalf, and on the faith that the plaintiff so knew of, acquiesced in, and consented to the defendant's so pulling down the said messuage, and erecting the said other messuage, and expending the said sums of money in that behalf as aforesaid, respectively.

Second replication to the sixth plea,—“upon equitable grounds,”—that the plaintiff acquiesced and consented as in the said sixth plea mentioned, upon the faith of certain false representations theretofore made to him by the defendant and her agents, that is to say, representations that the grievances in the first three counts of the declaration respectively contained would not, nor would any or either of them, result from or be produced by the pulling down of the said messuage, and the erecting of the said other messuage, and the expending of the said sums of money in the said sixth plea mentioned.

The plaintiff also demurred to the sixth plea, the grounds stated in the margin being, “that the said sixth plea does not disclose such a state of facts as would entitle the defendant in the Court of Chancery to a perpetual injunction to restrain an action in respect of the grievances complained of in the first three counts of the declaration respectively; that the sixth plea does not allege that any perceptible injury to the plaintiff's rights had arisen, or was likely to arise, at the time of the alleged acquiescence and consent of the plaintiff; and that the said sixth plea does not show that the plaintiff had notice at the time of the alleged acquiescence that the grievances in the \*first three counts [\*702 mentioned, or any of them, had arisen, or were likely to arise.” Joinder.

The defendant demurred to the replication to the sixth plea, the grounds stated in the margin being, “that the replication does not state that the representations therein mentioned were false to the knowledge of the defendant or her agent; and that the representations mentioned in the replication are merely representations as to matters of opinion, and that the fact of such representations proving to be incorrect in the result does not disentitle the defendant to the relief claimed by the sixth plea.” Joinder.

*Murphy* (with whom were *Lush*, Q. C., and *R. E. Turner*), for the

(a) By a Judge's order, made by consent, it was ordered, that, on the argument of the demurrer, the plea should not be relied on as a good plea of leave and license at common law.

plaintiff.(a)—The first count charges the defendant with obstructing the  
 \*703] light to the plaintiff's \*ancient windows, the second with raising  
 and erecting certain walls and buildings and thereby causing his  
 chimneys to smoke, and the third with depriving the plaintiff's house  
 of the support he was entitled to. To these counts the defendant pleads  
 that the grievances complained of were occasioned by the pulling down  
 and rebuilding of her premises, and that she so pulled down and rebuilt  
 her premises, and expended large sums of money in so doing, with the  
 knowledge, acquiescence, and consent of the plaintiff, and on the faith  
 that the plaintiff so knew, acquiesced in, and consented to the defend-  
 ant's so pulling down and rebuilding her premises, and expending the  
 said money in that behalf as aforesaid. The equitable doctrine of ac-  
 quiescence has been considered in a variety of cases: it underwent much  
 discussion in the recent case of *Bankhart v. Houghton*, 27 Beavan 425,  
 28 Law J., Chan. 473. [WILLES, J.—There are two classes of cases,  
 —one, where a man consents to work being done and money expended  
 upon it,—the other, where a man by his conduct has induced another to  
 incur expense on his own land.] This plea is excluded from the first  
 class, and it states no facts to bring the case within the second. Some-  
 thing more than passive acquiescence is required: there must be some-  
 thing like bad faith,—*Dann v. Spurrier*, 7 Ves. 231,—or active  
 encouragement held out,—*Williams v. The Earl of Jersey*, Cr. & Ph.  
 91. The whole doctrine is contained in a note of two cases in 2 Eq.  
 Ca. Abr. p. 522, pl. 3. "A. diverted a watercourse, which put B. to  
 great expense in laying of sooths, &c., and the diversion being a nui-  
 sance to B., he brought his action; but an injunction was decreed  
 \*704] \*upon a bill exhibited for that purpose, it being proved that B.  
 did see the work when it was carrying on, and connived at it,  
 without showing the least discouragement, but rather the contrary.  
*Short v. Taylor*, in Lord Somers's time, was cited; which was, Short  
 built a fine house; Taylor began to build another, but laid part of his  
 foundation upon Short's land. Short, seeing this, did not forbid him,  
 but, on the contrary, very much encouraged it; and, when the house  
 was built, he brought an action; and Lord Somers granted an injunc-  
 tion, and said it was but just and reasonable; for, being a nuisance,  
 every continuance is a fresh nuisance, and so he would be perpetually  
 liable to actions, which would be hard, when he was encouraged by the  
 party himself: *Anon. M. 8 Ann.* [WILLES, J., referred to *Winter v.*

(a) The points marked for argument on the part of the plaintiff were as follows:—

*As to the demurrer to the sixth plea*,—"1. That Courts of equity will not restrain the assertion of legal rights, on the ground of passive acquiescence, in the absence of fraud:

"2. That acquiescence must be with a full knowledge of the nature and character of the acts acquiesced in; and that a party is not debarred from objecting as soon as consequences manifest themselves which were not previously foreseen, even although they were a probable result of the acts acquiesced in:

"3. That the plea does not show that the grievances complained of were, or were thought by the plaintiff, likely to result from the pulling down and erecting of the defendant's said house, or that they were perceptible at the time of the plaintiff's alleged acquiescence:

"4. That the plea does not allege that the plaintiff acquiesced in the committing of the various grievances in the three counts mentioned."

*As to the demurrer to the replication*,—"1. That acquiescence is not binding in equity, if made either in ignorance or mistake of facts; much less if based upon the faith of representations which turn out to be false:

"2. That acquiescence given under an erroneous opinion, and in ignorance of the probable consequence of the act acquiesced in, is not binding."

Brockwell, 8 East 308, where it was held that a parol license to put a skylight over the defendant's area (which impeded the light and air from coming to the plaintiff's dwelling-house through a window), cannot be recalled at pleasure, after it has been executed at the defendant's expense,—at least, not without tendering the expenses he had been put to; and therefore that no action lay as for a private nuisance in stopping the light and air, &c., and communicating a stench from the defendant's premises to the plaintiff's house by means of such skylight. *Kingdon*.—That is qualified by the subsequent case of *Wood v. Leadbitter*, 13 M. & W. 838.† WILLES, J.—Not at all: it was an act done upon the land of another person, and of a permanent character.] The Court of Chancery will not grant an injunction to restrain the erection of works, upon a mere suggestion that they are likely to be injurious to the right of another: *Haines v. Taylor*, 2 Phill. 209: the mere prospect of injury gives no right to such relief: *The Attorney-General v. The Council of the Borough of Birmingham*, 4 K. & J. 528. \*At all events, [\*705 the replication, which alleges that the acquiescence and consent of the plaintiff were given upon a representation on the part of the defendant which was false, affords a good answer. The authorities show that acquiescence given under a mistake, is not binding.

*Kingdon*, for the defendant.(a)—Acquiescence in equity need not be so strong as is required to support a plea of leave and license at common law. In equity, the mere standing by and seeing a party expending money upon works, and saying nothing, has been held to be such acquiescence as to preclude the person so \*standing by from [\*706 afterwards objecting. [WILLES, J.—He knowing that the works were done under an erroneous impression on the part of the person doing them that he had a right to do as he did.] Probably the amount of acquiescence which appeared in *Williams v. The Earl of Jersey*, Cr. & Ph. 91, would not have been sufficient to induce a jury to find leave and license. In *Liggins v. Inge*, 7 Bingh. 682 (E. C. L. R. vol. 20), 5 M. & P. 712, where the plaintiff's father by oral license permitted the defendants to lower the bank of a river, and make a weir above the plaintiff's mill, whereby less water than before flowed to the plaintiff's mill,—it was held that the plaintiff could not sue the defendants for continuing the weir. In giving the judgment of the Court, Tindal, C. J., says: "This is not a license to do acts which consist in repetition, as, to walk in a park, to use a carriage-way, to fish in the waters of

(a) The points marked for argument on the part of the defendant were as follows:—

*As to the demurrer to the sixth plea*,—"That the facts stated in the sixth plea would entitle the defendant to a perpetual injunction in Chancery against this action; that the plea does not show knowledge and acquiescence by the plaintiff during the whole time the grievances were being committed; and that, if no perceptible injury to the plaintiff had accrued at the time of the alleged knowledge and acquiescence, that will be evidence for the plaintiff at the trial to negative his knowledge and acquiescence, but does not form any objection to the plea."

*As to the demurrer to the replication*,—"That no fraud is imputed by the replication to the defendant or her agents, and that the defendant is not disentitled to the relief she claims by the sixth plea, by reason of having made inaccurate statements on a matter of opinion, without fraud, on the correctness of which statements the plaintiff was as competent to judge as the defendant; that it is not stated in the replication that the agents therein mentioned were authorized by the defendant to make such false statements; that it is consistent with the replication that the plaintiff himself well knew that the grievances in the declaration would result from and be produced by the pulling down of the defendant's building and erecting the other building; and that, if he did know it, he is not entitled to complain of any statements made by the defendant and her agents."

another, or the like; which license, if countermanded, the party is but in the same situation as he was before it was granted: but this is a license to construct a work, which is attended with expense to the party using the license; so that, after the same is countermanded, the party to whom it was granted may sustain a heavy loss. It is a license to do something, that, in its own nature, seems intended to be permanent and continuing. And it was the fault of the party himself, if he meant to reserve the power of revoking such a license, after it was carried into effect, that he did not expressly reserve that right when he granted the license, or limit it as to duration. Upon principle, therefore, we think the license in the present case, after it was executed, was not countermandable by the person who gave it, and consequently that the present action cannot be maintained. And, upon authority, this case appears to be already decided by that of *Winter v. Brockwell*, 8 East 308, which \*707] rests on the judgment in *\*Webb v. Paternoster*, Palmer 71. We see no reason to doubt the authority of that case, confirmed, as it since has been, by the case of *Tayler v. Waters*, 7 Taunt. 374, 2 Marsh. 551, in this Court, and recognised as law in the judgment of Bayley, J., in the case of *Hewlins v. Shippam*, 5 B. & C. 221 (E. C. L. R. vol. 11), in the Court of B. R." *Tayler v. Waters* is expressly overruled by the case of *Wood v. Leadbitter*. Assuming that the Court of Exchequer were right in the last-mentioned case in holding that a parol license to go upon the land of another, though money was paid for it, was revocable at any time, it was thought more prudent to plead this as an equitable plea. The order of Williams, J., was merely that the words "acquiescence and consent" should not be relied on as amounting to leave and license at common law: it never was intended to preclude the defendant from dealing with it as an equitable defence. In *The Rochdale Canal Company v. King*, 22 Law J., Chan. 604, the Master of the Rolls (Sir John Romilly) lays down the rule almost in the same terms in which it is laid down in *Bankart v. Houghton*, 27 Beavan 425. "The defendants," he says, "contend that they are entitled to continue this practice, not by reason of the provisions of the Act, but because the plaintiffs have not only acquiesced in their so doing, but have knowingly permitted the defendants to construct their mills upon the principle of using the water of the canal for other than condensing purposes, and that, having so done, they cannot complain of the conduct of the defendants. The principle upon which the defendants rely is laid down in *Dann v. Spurrier* and *Powell v. Thomas*, 6 Hare 300, and is, that, if one man stands by and encourages, though but passively, another to lay out money under an erroneous opinion of title, or under the obvious \*708] expectation that no obstacle will afterwards be interposed in "the way of his enjoyment, the Court will not permit any subsequent interference with it by him who formally permitted and encouraged those acts of which he either now complains or seeks to obtain the advantage." Lord Eldon, in *Williams v. The Earl of Jersey*, Cr. & Ph. 97, referring to the cases of the *Watercourse* and *Short v. Taylor*, says: "I think it is impossible, after those two cases, to say that a party may not so encourage that which he afterwards complains of as a nuisance, as not only to preclude himself from complaining of it in this Court, but to give the adverse party a right to the interposition of this Court in the event of his complaining of the nuisance at law." The present case

steers clear of all the difficulties suggested in the judgment of the Master of the Rolls in *Bankart v. Houghton*, 27 Beavan 425. The placing of every additional course of bricks upon the walls gave notice to the plaintiff of what was being done. Then, as to the replication, it would be a strong thing to hold that a party is bound by a mere representation of matter of opinion which may turn out to be incorrect. [WILLES, J.—Is not this settled by the case of *Rawlins v. Wickham*, 3 De Gex & Jones 304, where it is laid down by the Lords Justices, that, where a party has been induced to enter into a contract by a material misrepresentation of the other party, he is entitled to have the contract set aside, and not merely to have the misrepresentation made good.] A case of contract is different. If the plaintiff meant to object, he should have given notice.

*Murphy*, in reply.—[ERLE, C. J.—I believe we are all agreed that the replication is a good equitable replication. What do you say to the plea?] To constitute this a good equitable plea, the defendant must show that all the grievances of which the plaintiff \*complains [\*709] were visible and were known to the plaintiff during the progress of the work. To entitle him to an injunction, his bill must allege all that. The mere prospect of injury is not enough: the Court of Chancery will not interfere until damage has actually been sustained.

ERLE, C. J.—The plaintiff by his declaration complains of three several grievances,—first, an obstruction of the light and air to his ancient windows,—secondly, the raising and erecting of certain walls and buildings by the defendant, whereby the smoke and vapour from the plaintiff's chimneys were prevented from being carried off,—thirdly, the depriving his house of the support which he was entitled to. The defendant pleads, by way of equitable defence, that the grievances in the declaration mentioned were occasioned by the pulling down and rebuilding of the defendant's house, that the plaintiff had notice of the premises, and that the old building was pulled down and the new one erected, and large sums of money were expended thereon by the defendant, with the knowledge, acquiescence, and consent of the plaintiff, and on the faith that the plaintiff so knew of, acquiesced in, and consented to the defendant's so pulling down and rebuilding as aforesaid. I am of opinion that that is a good equitable plea. As far as I can gather the principles from the cases cited and from my limited experience in the administration of that branch of the law, it appears to me that the plea contains all the requisites which would have entitled the defendant to relief in equity if he had gone there. It in terms alleges that the plaintiff knew of, acquiesced in, and consented to the defendant's pulling down the old building and erecting the new one, and the expenditure of money by the defendant thereon, and that all the grievances [\*710] \*complained of were occasioned thereby. I think the plea is to be construed in the sense in which Mr. *Murphy* contends it should have been pleaded, viz., that the acts of the defendant in so pulling down and rebuilding were known to and consented to by the plaintiff, and that the grievances complained of were the natural consequences of those acts. If the plaintiff's house leaned upon the walls of the defendant's buildings, and the latter were pulled down, he must be taken to have known that the natural consequence would be a sinking of his house. So, if a high wall were built up opposite his windows, the plaintiff must

be taken to have known that the light and air would be obstructed thereby. The smoke nuisance is somewhat more doubtful: but I should have thought every one knew that the raising of an adjoining building must necessarily prevent the smoke from freely passing from the old chimneys. Upon the whole, I think the plea does allege that the plaintiff so conducted himself as to induce the defendant to believe that he had given his consent to the alterations she was making, and to induce her to lay out money upon the faith of such consent. If so, the plaintiff clearly has no right afterwards to withdraw his consent and bring an action. I think the plea is a good equitable plea. I also think the replication is a good equitable replication to the sixth plea. It alleges that the plaintiff acquiesced and consented as in the plea mentioned, upon the faith of certain false representations theretofore made to him by the defendant and her agents, that the grievances in the declaration contained would not result from or be produced by the said pulling down and rebuilding. It seems to me that that does in effect deny that the plaintiff gave his sanction to acts, the natural consequences of which he knew would be to abridge and interfere with his rights and with the \*711] enjoyment of his premises. If the fact be as alleged in the replication, the plaintiff did not by any acquiescence on his part delude the defendant into the belief that she might with impunity do as she did. The replication, therefore, takes away from the defendant the equitable defence relied on. I am of opinion that the defendant is entitled to judgment on the demurrer to the plea, and that the plaintiff is entitled to judgment on the demurrer to the replication.

WILLIAMS, J.—I entirely agree with what has fallen from my Lord. I will only add that I decline to regard the plea in the second aspect in which it was presented by Mr. *Kingdon*; and that I do not accede to his suggestion that *Winter v. Brockwell* and *Liggins v. Inge* are overruled or shaken by the judgment of Lord Wensleydale in *Wood v. Leadbitter*.

WILLES, J.—I also concur in the judgment which has been given by the Lord Chief Justice. However unlikely it may be that the defendant will be able to substantiate his plea at the trial, as pleaded it certainly does set up either that the plaintiff actually gave his consent to the doing of the acts complained of, or that he so conducted himself that a reasonable man might fairly conclude that he did give that consent. Conduct in a Court of common law often does amount to an estoppel, and is evidence of leave and license which is incapable of being controverted. I shall be surprised if it should turn out, as a matter of equity, that any conduct short of that or gross and intentional negligence would afford a foundation for a proceeding in Chancery to restrain a party from suing for acts of the description here complained of, where the defendant is not in a position to set up leave and license under one \*712] or other of the two heads at common law. I cannot help thinking that the substantial contest will arise upon the evidence. But the defendant is confined to such a defence under this plea, as would show him entitled to a perpetual unqualified injunction in a Court of equity. Then, the replication is let in. The doctrine of the Court of Chancery, according to *Rawlins v. Wickham*, 3 De Gex & Jones 304, is, that, if a man by misrepresentation of a material fact induces another

to give a consent, he cannot insist upon it. I think the replication is a good answer to the plea.

BYLES, J.—I am of the same opinion, though I speak with great diffidence, so little am I familiar with the doctrine of the Courts of equity. We are bound to consider this as an equitable plea. If it be a good equitable plea, then the defendant is entitled to judgment on the first demurrer; if not, then the plaintiff would be entitled. For the reasons already given, I think the plea sets up a good equitable defence. In the result, it is a mere question of costs. The effect of the replication is that the plaintiff gave his consent in reliance on the representations of the defendant. The replication therefore shows a good answer to the plea.

Judgment for the defendant on the demurrer to the plea.

Judgment for the plaintiff on the demurrer to the replication.

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**\*BLADES v. HIGGS and Another. June 8. [\*713**

The owner of goods (or his servants acting by his command) which are wrongfully in the possession of another, may justify an assault in order to repossess himself of them, no unnecessary violence being used.

To a count for assaulting the plaintiff, the defendants pleaded that the plaintiff had wrongfully in his possession dead rabbits belonging to the Marquis of E., and was about wrongfully and unlawfully to carry away and convert them to his own use, whereupon the defendants, as the servants of the marquis, and by his command, requested the plaintiff to refrain from carrying away and converting the rabbits, which he refused to do, whereupon they, as the servants of the marquis, and by his command, molliter manus imposuerunt, using no more force than was necessary to take the rabbits from him:—Held, a good plea.

THE declaration charged that the defendants assaulted and beat and pushed about the plaintiff, and took from him his goods, that is to say, dead rabbits.

The defendants pleaded, amongst other pleas,—thirdly, as to the assaulting, beating, and pushing about the plaintiff, that the plaintiff, at the said time when, &c., had wrongfully in his possession certain dead rabbits of and belonging to the Marquis of Exeter; that the said rabbits were then in the possession of the plaintiff without the leave and license and against the will of the said marquis; and that the plaintiff was about wrongfully and unlawfully to take and carry away the said rabbits and convert the same to his own use; whereupon the defendants, as the servants of the marquis, and by his command, requested the plaintiff to refrain from carrying away and converting the same rabbits, and to quit possession thereof to the defendants as such servants, which the plaintiff refused to do; and that thereupon the defendants, as the servants of the said marquis, and by his command, gently laid their hands upon the plaintiff, and took the said rabbits from him, using no more force than necessary; which were the alleged trespasses in the declaration mentioned, &c. Demurrer and joinder.

*Beasley*, in support of the demurrer.—The plea is clearly bad. In order to sustain it, it must be made out, that, wherever A.'s goods are wrongfully in the hands of B., A. or his servants may forcibly take them, without showing that a felony has been committed, or the way in

\*714] which the goods came to B.'s possession, \*or that the defendant was attempting to retake them on fresh pursuit. To permit this, would be manifestly against one of the first principles of law. It is not alleged that the defendant had wrongfully taken the rabbits. He might have been an innocent bailee, or a purchaser in market overt. [BYLES, J.—Or an executor.] No precedent is to be found for such a plea: it does not show that there was any resistance to a lawful demand, or any necessity for an assault. All the precedents are of acts done in the defence of the party's possession of the goods.(a) Here, there is no allegation that the Marquis of Exeter ever was in possession of these rabbits. The whole foundation, therefore, of the plea fails. In *Anthony v. Haney*, 8 Bingh. 186, 1 M. & Scott 300 (E. C. L. R. vol. 28), in trespass for entering the plaintiff's close, a plea that certain goods of the defendants were there, and that they entered to take them, doing no unnecessary damage, was held ill. In giving judgment, Tindal, C. J., there says: "In none of the cases referred to has the plea been allowed, except where the defendant has shown the circumstances under which his property was placed on the soil of another. Here, the defendant has confined himself to the statement that they were there, without attempting to show how. To allow such a statement to be a justification for entering the soil of another, would be opening too wide a door to parties to attempt righting themselves without resorting to law, and would necessarily tend to breach of the peace." A fortiori it must be unlawful to commit an *assault* for the purpose of getting possession of a man's goods. *Rex v. Milton*, M. & M. 107 (E. C. L. R. vol. 22), will probably be cited for the defendants. The marginal note, which seems opposed to the present argument, is altogether a misrepresentation of the matter \*decided. In no case has it been held that a

\*715] servant may justify an assault in order to retake, or even in defence of, the goods of his master. On the contrary, there is authority for saying that a man cannot justify a battery in defence of the goods or possession of his master: *Com. Dig. Pleader* (3 M. 14), (3 M. 17), citing *Shingleton v. Smith*, 2 Lutw. 1843.(b) [ERLE, C. J.—By command of his master?]

*Field, contra.*—This is a perfectly good plea. The facts alleged by the plea, and admitted by the demurrer, are these,—that the rabbits belonged to the Marquis of Exeter, that he was entitled to the possession of them against all the world, that they were wrongfully and against the will of the owner in the plaintiff's possession, that the plaintiff was about wrongfully and unlawfully to take them away and convert them to his own use, that the defendants, as the servants of the owner, and by his command, requested the plaintiff to refrain from carrying them away,

(a) See 2 Chitty Pl. 345, et seq.

(b) "Nota, que fuit dict en cet case per Powel, J., que un servant poiet justifie en defence de son master, mes il ne poiet justifie un battery en defence de les biens de son master; et en *Jones and Tresilian's Case*, 1 Mod. Rep. 36, est dit per Twisden, J., que un ne poiet justifie le battery d'un aut' en defence de son possession, mais il poiet dire que il mollit' manus imposuit, et per Keeling, que le def. en cet case doit dire que il mollit' manus imposuit, quee est eadem, &c. Pur ceux matters, vide auxi *Owen's Rep.* 93, 94, *Ireland's Case*, and 150, *Seaman and Cappel-dick's Case*, and 2 Inst. 316, ou est dit que un poiet justifie un assault et battery en defence ou pur le preservat' de son possession de terre ou biens, mes il ne poiet justifie le mayning ou wounding ou manas de vie et member, et issint (come le livre dit) Nota un diversity enter le defence de son possession ou de ses biens."

and that, upon his refusal, they gently laid their hands upon the [\*716  
 \*plaintiff and took the rabbits from him, using no unnecessary force. Whatever doubt may formerly have been entertained on the subject, it is now clearly settled that a man may lawfully take possession of land to the possession of which he is by law entitled, and from the possession of which he is unlawfully excluded: *Newton v. Harland*, 1 M. & G. 644 (E. C. L. R. vol. 39), 1 Scott N. R. 474; *Harvey v. Brydges*, 14 M. & W. 437.† In this latter case, the declaration stated that the defendants with force and arms broke and entered a certain messuage, &c., and then expelled the plaintiff from the possession and occupation of the same: the defendants pleaded that the messuage, &c., were the soil and freehold of the defendants, wherefore they committed the said trespasses in the said messuage, &c., as they lawfully might for the cause aforesaid: and it was held that *liberum tenementum* was a good plea, and that it was not to be inferred from the declaration that there was any breach of the peace or forcible entry, the averment of *vi et armis* being a mere formal allegation that the defendants entered with some force sufficient to enable them to get into possession. Parke, B., there says: "If it were necessary to decide it, I should have no difficulty in saying, that, where a breach of the peace is committed by a freeholder, who, in order to get into possession of his land, assaults a person wrongfully holding possession of it against his will, although the freeholder may be responsible to the public in the shape of an indictment for a forcible entry, he is not liable to the other party. I cannot see how it is possible to doubt that it is a perfectly good justification to say that the plaintiff was in possession of the land against the will of the defendant, who was the owner, and that he entered upon it accordingly, even though in so doing a breach of the peace was committed."

[BYLES, J.—The common law \*gives a right of entry to one who [\*717 is wrongfully dispossessed of land. But the doubt I entertain is, whether there is such a right of recapture of chattels.] Both are put upon the same footing in Lord Coke's commentary on the Statute of Gloucester (6 Ed. 1), 2 Inst. 316,—"*There is also another diversity between an appeal of mayhem, or an action of trespass for wounding, or mannas of life and member, and an action of trespass of assault and battery for a man in defence or for the preservation of his possession of lands or goods; for, in that case, he may justify an assault and battery; but he cannot justify either mayheming or wounding or mannas of life and member: and so note a diversity between the defence of his person and the defence of his possession or goods.*" [BYLES, J.—That is where a man is trying to retain possession, and not to *take* possession of his goods.] In *Rex v. Milton*, M. & M. 107 (E. C. L. R. vol. 22), the chattel was not in the possession of the person charged with the assault. In Roll. Abr. *Trespass* (D), it is said: "*Le baron poet justifie la batterrie d'un auter en defence de son feme, car et est vostre chattell: 19 H. 6, fo. 31 b, pl. 66. Le master poet justifie le batterrie d'un auter en defence de son servant, car le servant est en manner son chattel: 19 H. 6, fo. 31 b, pl. 66. Le servant poet justifier le batterrie d'un auter en defence de son master: 11 H. 6, fo. 16.*" In *Seaman v. Cuppledick*, Owen 150, "in a trespass of assault and battery, the defendant justified in defence of his servant, viz., that the plaintiff had assaulted his servant, and would have beaten him, &c.; and the plaintiff demurred. Yelverton.—

The bar is good, for the master may defend his servant, or otherwise he may lose his service: 19 H. 6, fo. 60 a. Crook, J.—The lord may justify in defence of his villain, for he is his inheritance. Williams, \*718] *contra*.—The master cannot justify, but the servant may justify \*in defence of his master; for, he owes duty to his master: 9 E. 4, fo. 48. Yelverton.—The master may maintain a plea personal for his servant; (21 H. 7), and shall have an action for beating his servant; and also a man may justify in defence of his cattle. Cook.—*A man may use force in defence of his goods*, if another will take them: and so, if a man will strike your cattle, you may justify in defence of them; and so a man may defend his son or servant; but he cannot break the peace for them: but, if another does assault the servant, the master may defend him, and strike the other, if he will not let him alone.” In Hawk. P. C. (edit. 1824, by Curwood), Book. 1, c. 28 (*Surety of the Peace*), s. 23, it is laid down that “there are some actual assaults on the person of another which do not amount to a forfeiture of such a recognisance; as, if I beat one (without wounding him or throwing at him a dangerous weapon) who wrongfully endeavours with violence to dispossess me of my land or goods, or the goods of another delivered to me to be kept for him, and will not desist upon my laying my hands gently on him and disturbing him.” Again, c. 64, s. 1, it is said: “It seems certain, that, even at this day, he who is wrongfully dispossessed of his goods, may justify the retaking of them by force from the wrongdoer, if he refuse to redeliver them; for the violence which happens through the resistance of the wrongful possessor, being originally owing to his own fault, gives him no just cause of complaint, inasmuch as he might have prevented it by doing as he ought.” In *Wisdom v. Hodson*, 3 Tyrwh. 811, there is a plea very similar to that now before the Court, which was held bad upon grounds which will sustain this plea. The point now urged was never suggested there. If it should turn out that the rabbits were not the property of the \*719] *Marquis of Exeter*, the plaintiff will succeed at the trial: if they were, the authorities referred to show that the defendants were justified. Upon principle, there can be no substantial difference between an assault committed in defence of a man’s land or goods, and an assault committed in regaining possession of either, where no unnecessary violence is used. [BYLES, J.—It shifts the burthen of proof.]

*Beasley*, in reply.—*Wisdom v. Hodson* is an authority in favour of the plaintiff. Lord Lyndhurst, in the course of the argument, says,—“If the defendant’s act could have been justified by fresh pursuit, and that would be necessary to support the defence, it has not been stated.” In *Anthony v. Haney*, Bosanquet, J., says: “It is put broadly and nakedly that the defendant has a right to enter the soil of another to take his own property, without showing the circumstances under which it came there. The case has been argued on the ground of necessity: but on that ground, at least the necessity should be shown. There are, no doubt, various cases in which it has been held that the party is entitled to enter, but in all of them the peculiar circumstances have been stated on which the party has rested his claim to enter. It would be too much to infer that the party may enter in all cases where his goods are on the soil of another, because he may enter in some where he shows suffi-

cient grounds for so doing." Public policy requires that this plea should be held to be bad. *Cur. adv. vult.*

ERLE, C. J., now delivered the judgment of the Court:—

The declaration in this case was for an assault and battery. The substance of the justification was, that, \*the plaintiff having wrong- [\*720 fully in his possession rabbits belonging to the defendants (we consider the servants here the same as the master), and being about to carry them away, the defendants requested him to refrain, and, on his refusal, mollitur mones imposuerunt, and used no more force than was necessary to take the rabbits from him. To this the plaintiff has demurred, and thereby admits that he was doing the wrong, and that the defendants were maintaining the right, as alleged: and he contends that the defendants are not justified in using necessary force, on account of the danger to the public peace: but he adduces no authority to support his contention. The defendants likewise have failed to adduce any case where the justification was supported without an allegation to explain how the plaintiff took the property of the defendant and became the holder thereof. But the principles of law are in our judgment decisive to show that the plea is good, although that allegation is not made.

If the defendants had actual possession of the chattels, and the plaintiff took them from them against their will, it is not disputed that the defendants might justify using the force sufficient to defend their right and retake the chattels: and we think there is no substantial distinction between that case and the present; for, if the defendants were the owners of the chattels, and entitled to the possession of them, and the plaintiff wrongfully detained them from them after request, the defendants in law would have the possession, and the plaintiff's wrongful detention against the request of the defendants would be the same violation of the right of property as the taking of the chattels out of the actual possession of the owner.

It has been decided that the owner of land entitled to the possession may enter thereon and use force \*sufficient to remove a wrong- [\*721 doer therefrom. In respect of land, as well as chattels, the wrongdoers have argued that they ought to be allowed to keep what they are wrongfully holding, and that the owner cannot use force to defend his property, but must bring his action, lest the peace should be endangered if force was justified: see *Newton v. Harland*, 1 M. & G. 644, 1 Scott N. R. 474. But, in respect of land, that argument has been overruled in *Harvey v. Brydges*, 14 M. & W. 442.† Parke, B., says: "Where a breach of the peace is committed by a freeholder, who, in order to get possession of his land, assaults a person wrongfully holding possession of it against his will, although the freeholder may be responsible to the public in the shape of an indictment for a forcible entry, he is not liable to the other party. I cannot see how it is possible to doubt that it is a perfectly good justification to say that the plaintiff was in possession of the land against the will of the defendant, who was owner, and that he entered upon it accordingly; even though in so doing a breach of the peace was committed."

In our opinion, all that is so said of the right of property in land, applies in principle to a right of property in a chattel, and supports the present justification. If the owner was compellable by law to seek redress by action for a violation of his right of property, the remedy

would be often worse than the mischief, and the law would aggravate the injury instead of redressing it.

For these reasons, our judgment is for the defendants.

Judgment for the defendants.

It has been held in several cases in this country, that trespass *quare clausum fregit* will not lie against the real owner of land for a forcible entry and dispossession of a tenant holding over, or other person in unlawful occupation. The plea of *liberum tenementum* is an absolute bar to the action. The landlord, as owner, may be liable for the public wrong in an indictment for forcible entry; but he is not so as respects any supposed injury to the land, nor is the possession which he thus acquires by force therefore, an unlawful one: *Hyatt v. Wood*, 4 Johns. 150; *Sampson v. Henry*, 13 Pick. 36; *Ives v. Ives*, 13 Johns. 235; *Meade v. Stone*, 7 Metcalf 147; *Beecher v. Parmalee*, 9 Vermont 356; *Overdeer v. Lewis*, 1 W. & S. 239; *Kellam v. Janson*, 17 Penn. St. 467; *Zell v. Ream*, 31 Id. 804.

A distinction, however, is taken in some of the decisions, according to which the owner of land will be liable in damages for an assault and battery committed on the *person* in wrongful possession. In *Fribble v. Frame*, 3 Monr. 13, it was held that a plea of *liberum tenementum* simply to an action of trespass, for that the defendant had broken into the plaintiff's close, and also assaulted and beaten himself, his servants and horses, was bad, inasmuch as it did not deny the latter allegation. Of course, a right of entry on land could not carry with it the privilege of beating any one who might be found there, whether necessary or not to the recovery of possession. In *Sampson v. Henry*, 11 Pick. 387, it was more definitely

decided that it was not a sufficient plea to an action for assault and battery on the plaintiff in his dwelling-house, that the defendant was the owner of the dwelling-house, and that possession was unlawfully withheld from him, and that he used no more force than was necessary to overcome the plaintiff's resistance. "The law," it was then said, "does not allow any one to break the peace, and forcibly to redress his private wrongs. He may make use of force to defend his lawful possession; but being dispossessed, he has no right to recover possession by force and by a breach of the peace. This is no defence to a personal action." This was recognised in the same case, in 13 Pick. 36. The same distinction is taken in *Hyatt v. Wood*, 3 Johns. 239; 4 Johns. 150; and also in *Beecher v. Parmalee*, 9 Verm. 356; and see *Ellis v. Paige*, 1 Pick. 43; *Moore v. Boyd*, 11 Shepley (Maine) 247. Whether these authorities express the true technical rule of law or not, there can be little doubt that it would not tend to the peace of the community if every question of title involved or justified an assault and battery. The risk of an indictment would not much deter a landlord, who had to deal with a refractory tenant; nor would an occupant of land who believed himself (however erroneously) to be lawfully in possession, hesitate to resist, with whatever violence, an attempt to turn him out by force. It does not seem right to tempt men into breaches of the public peace, by allowing them to retain advantages which they have secured thereby.

**\*WOODWARD v. DOWSE.** *June 20.* [**\*722**]

A woman forfeits her dower, under the statute of Westminster 2, c. 34, by adultery, without reconciliation, even though she originally departed from her husband's house in consequence of his cruelty.

**DOWER unde nihil habet.** Henrietta Woodward, widow, who was the wife of John Woodward, deceased, by G. D. W., her attorney, demands against Thomas Dowse the third part of ten acres of meadow land, ten acres of pasture, and ten acres of other land, with the appurtenances, in the parish of Leverton, in the county of Lincoln, as the dower of the said Henrietta Woodward, of the endowment of John Woodward, deceased, heretofore her husband, whereof she hath nothing, &c.

Second plea,—that the said Henrietta Woodward, in the lifetime of the said John Woodward, and during her coverture with or whilst she was the wife of the said John Woodward, of her own accord, and without the license or consent and against the will of the said John Woodward, left him the said John Woodward, and thereupon and continually afterwards for a long time lived in adultery with one John Cabourn; and that the said John Woodward was not at any time after the said Henrietta Woodward so as aforesaid left him, or after she so lived in adultery as aforesaid, in any manner reconciled to her.

Second replication to the second plea,—that the plaintiff was forced and obliged to and necessarily and lawfully did leave the said John Woodward as in the said second plea mentioned by reason of his cruelty to her to such an extent as to render her cohabitation with him unsafe, and to entitle her to a divorce à mensa et thoro or a judicial separation; and that she was at all times ready and willing to return to cohabitation with him, but for his said cruelty and his \*afterwards living in [**\*723** adultery with a woman named Hibbins.

Demurrer and joinder.

*Hayes, Serjt.*, in support of the demurrer.(a)—The adultery is admitted on the record. Dower was not forfeited by adultery, at common law. But, by the statute of Westminster 2 (13 Ed. 1), c. 34, it was provided, that, “if a wife willingly leave her husband, and go away, and continue with her advouterer, she shall be barred for ever of action to demand her dower that she ought to have of her husband's lands, if she be convict thereupon, except that her husband willingly, and without coercion of the church, reconcile her, and suffer her to dwell with him; in which case she shall be restored to her action.” The commentary upon this is,—“In this case of elopement, and remaining with the adulterer, &c., the wife could not be barred of her dower by the common law; no, though a divorce were sued and had for the said adultery, as

(a) The points marked for argument on the part of the defendant were as follows:—

“1. That, to avoid the disability of a woman to recover her dower after she has committed adultery, it is necessary that she was reconciled to her husband spontaneously on his part, and that they had since lived together as man and wife prior to his death; and that the replication does not allege that John Woodward was ever reconciled to the plaintiff after she had committed the adultery, or that they afterwards lived together as man and wife:

“2. That the plaintiff's answer in the replication does not obviate the disabilities arising from her adultery, and that her adultery without reconciliation has barred her of her dower:

“3. That the replication does not allege that the plaintiff's husband was ever reconciled to her after her elopement; and the plaintiff's adultery has barred her of her dower.”

\*724] \*you may read in the first part of the Institutes, § 36. Si *sponte reliquerit, et abierit, et moretur cum adultero, &c.* Albeit the words of this branch be in the conjunctive, yet, if the woman be taken away not *sponte* but against her will, and after consent, and remain with the adulterer without being reconciled, &c., she shall lose her dower; for, the cause of the bar of her dower is, not the manner of the going away, but the remaining with the adulterer in avowtry without reconciliation, that is the bar of the dower." Lord Coke then gives the case of John de Camoys, which was as follows:—"Sir William Raynell, Knight, and Margaret his wife, did demand the third part of the manor of Torpul, as the dower of the said Margaret after the death of John de Camoys, her first husband, that manor being then in the seisin of the King: the King's attorney answered, that she ought not to be endowed, *quia recessit a marito suo in vita sua, et vixit ut adultera cum prædicto Guilielmo, et non fuit viro suo reconciliata ante mortem suam, et sic per formam statuti inde prius editi non debet inde dotari.* The demandants replied, and pleaded a deed of the said John de Camoys under seal, (a) in these words,—*'Omnibus Christi fidelibus ad quos hoc præsens scriptum pervenerit, Johannes de Camoys, filius et hæres domini Randulphi de Camoys, salutem in domino. Noveritis me tradidisse ita dimisisse spontanea mea voluntate domino Guiliel. Raynel, militi, Margaretam de Camoys, filiam et hæredem Johannis de Gatesden, uxorem meam: Et etiam dedisse, concessisse, et eidem domino Guilielmo relaxasse, et quietum clamasse omnia bona et catalla quæ ipsa Margareta habet, vel de cætero habere possit, et etiam quicquid mei est de prædict. Margaretæ bonis vel catallis, cum suis pertinen': Ita quod nec ego, nec*  
 \*725] *aliquis alius nomine meo in prædicta \*Margareta, bonis et catallis ipsius Margaretæ, cum suis pertinen', de cætero exigere seu vendicare poterimus, nec debemus imperpetuum. Volo et concedo, et per præsens scriptum confirmo, quod prædicta Margareta, cum prædicto domino Guilielmo sit et maneat ex voluntate ipsius Guilielmi. In cujus rei testimonium sigillum meum apposui, &c., hiis testibus.'* And concluded their replication thus,—*'Virtute cujus scripti dicit quod non vixit ut adultera cum prædicto Guilielmo, sed ut uxor ejusdem Guilielmi.'* Whereupon the King's attorney demurred in law; and the record saith, *Et super hoc processum est ad judicium quod non debet dotari.*" Lord Coke further says: "Albeit she doth not continually remain in avowtry with the adulterer, yet, if she be with him and commit adultery, it is a tarrying within the statute." And see Co. Litt. 32 b, note 10. [WILLIAMS, J.—How does the plaintiff get over the case of Hethrington v. Graham, 6 Bingh. 135, 3 M. & P. 399? It was there held that adultery is a bar to dower, although committed after the husband and wife have separated by mutual consent.]

*Wills, contra.* (b)—Hethrington v. Graham is plainly distinguishable. Adultery alone is not sufficient to bar dower; there must be elopement.

(a) Called in the margin "*Concessio mirabilis et inaudita.*"

(b) The points marked for argument on the part of the plaintiff were as follows:—

"1. By the statute of Westminster 2, c. 34, there must be an absence from the husband, voluntary on the part of the wife, as well as adultery, to bar dower:

"2. That the replication shows that the absence relied on in the plea was in its commencement, and during its continuance, justifiable and involuntary on the part of the plaintiff; and that the plaintiff never left her husband, within the meaning of the statute, but was driven away, and kept from returning, by his misconduct."

The two \*requisites must concur,—adultery and voluntary absence. In *Hethrington v. Graham*, as in all the other cases in which the dower has been held to be barred, there was a voluntary absence from the husband. Here, the plea alleges that there was no elopement, no voluntary absence; but that the wife was driven away by her husband's cruelty and misconduct, and was always willing to return to co-habitation with him if she could safely do so. The only point raised in *Hethrington v. Graham* was, whether it was necessary that there should be a departure with the adulterer. [WILLIAMS, J.—The Court there rely on the doctrine of Lord Coke, and say “there is direct authority that *all* the circumstances mentioned in the statute need not concur in form, provided they do so in substance.” WILLES, J.—The Statute of Rape, 6 R. 2, c. 6, may throw some light upon the subject. According to Lord Coke the absence is “sponte” even though the wife be taken away against her will, provided she “after consent, and remain with the adulterer without being reconciled.” In that case she is living in adultery by her own act.] In Viner's Abridgment, *Dower* (P), pl. 9,—translated from Rol. Abr. *Dower* (P), pl. 9,—it is said: “If the friends of the husband esloin (esloigne) him from his wife, so that the wife does not know what is become of him, and the friends of the husband publish that the husband is dead, and after they procure the wife to release all marriages and interests which she can have in him as her husband, and after the wife by the persuasion of the friends of the husband marries with another that dies, and she takes another husband, to whom notice is given that the first is living, but no notice was given thereof to the wife, though the wife lives in adultery, and though the husband was not out of the realm or beyond sea, so that the wife ought to take notice that he was living, yet, \*inasmuch as she non reliquit virum sponte, as the statute says, but by the persuasion of the friends of the husband that he was dead, and it does not appear that she ever knew that he was living, this is not any such elopement as to bar her of her dower. Mich. 12 Jac. between Green and Harvey. Per Curiam.” And see Bro. Abr. *Dower*, pl. 12, citing 43 E. 3, fo. 19. See also Bright on Husband and Wife 538—541. In *Sidney v. Sidney*, 3 P. Wms. 266, 275, Lord Chancellor Talbot says: “As, in the present case, at the hearing of the cause the defendant has insisted upon what might have been very penal to the plaintiff, his wife, viz. the forfeiture of her dower, the crime for which she might have incurred such a penalty ought to be plainly laid to her charge, specified, and put in issue, that she may know what to rest her defence upon: whereas, here, her accusation is only general and uncertain, amounting to little else than that she has *withdrawn herself from her husband, lived separately from him, and very much misbehaved herself*: nothing of which implies that the plaintiff has been guilty of adultery, much less that she has eloped from him and gone away with an adulterer, *which alone would bar her of her dower*, supposing this were purely a question of dower.” Upon the same principle it is that a husband is held liable for necessaries supplied to his wife when compelled by his cruelty or misconduct to live apart from him: see this question elaborately discussed in *Manby v. Scott*, 1 Siderfin 109. Upon the whole, therefore, it is submitted that the replication is a good answer to the plea.

*Hayes*, Serjt., in reply.—The case of *Hethrington v. Graham* has not

been successfully distinguished. [BYLES, J.—I think it has. There, the parties were separated by mutual consent: here, it is alleged that \*728] \*it would be dangerous for the wife to return to cohabitation with her husband.] The ground upon which the decision proceeded appears from the close of the judgment,—“The authorities above referred to place the forfeiture of the dower upon the fact of a living from the husband in adultery, and not upon the circumstances attending the elopement: and, as we think the good sense and reason of the case concur with these authorities, we hold the proper construction of the statute to be what the words still will warrant, that, if a woman leaves her husband with her own free will, and afterwards lives in adultery, the dower is forfeited.” [BYLES, J.—There, the wife remained away, when she had an opportunity of returning: here, it is alleged that, by reason of her husband’s cruelty, she could not return. How would it be if the wife commit adultery in her husband’s house?] Lord Coke, 2 Inst. 436, commenting upon these words, “Nisi vir suus sponte, et absque coheritone ecclesiæ eam reconciliet, et secum cohabitare permittat,” says: “Note, that cohabitation is not sufficient without reconciliation made by the husband sponte, so as cohabitation only in the same house with the husband availeth her not, à fortiori though she remain with the avowtrier in any of the lands or mannours of her husband, yet she shall be barred of her dower by this branch, without the husband’s free reconciliation, albeit it hath been otherwise holden: and the reason that they yielded, is, because it is no elopement, whereas it appeareth before that the words of ‘reliquerit et abierit’ are not of the substance of the bar of dower, but the adultery, and the remaining with the adulterer, as is above said: and albeit she and the adulterer remain within any of the lands or mannours of the husband, yet, the words being, si uxor sponte reliquerit et abierit, she hath left and gone \*729] from her \*husband in that case, which is a personal offence.” [WILLES, J.—Every fresh cohabitation is a reconciliation: Rol. Abr. *Dower* (P), pl. 10; Vin. Abr. *Dower* (P), pl. 10. BYLES, J.—In Fitzherbert’s *Natura Brevium*, p. 149, it is said, that, “If the wife elope from her husband, and remain with the adulterer, she shall lose her dower; but, if she remain in adultery upon the husband’s lands or tenements, she shall have dower, because the same is not an elopement.”] The authority referred to, 43 G. 3, fo. 19 (misprinted 43 E. 2, 19), does not bear out the passage. In *Coot v. Berty*, 12 Mod. 232, in dower, the defendant pleaded elopement in the wife; the wife replied that her husband had bargained and sold her to the adulterer; and held bad: and the note goes on, “And license by husband to wife to lie with another man, cannot be pleaded in bar to an action of trespass by husband; nor that she was a notorious lewd woman: but these matters may be given in mitigation of damages.” In *Govier v. Hancock*, 6 T. R. 603, it was held that a husband was not bound to receive or to support his wife after she had committed adultery, though he had before committed adultery himself, and turned her out of doors, without any imputation on her conduct. And the Court put it on the ground mentioned by Lord Coke, Co. Litt. 32 a, that, “if a wife go away with an adulterer, she loses her dower.” The substance must be looked at, not the mere words of the statute: if she be not ravished, the elopement

of the wife is sponte. The replication here admits the adultery and its continuance without reconciliation until the husband's death.

WILLIAMS, J.—I am of opinion that the replication in this case is bad, and that our judgment must be for the defendant. Whatever might be our notion as to \*the proper construction of the statute [\*730 in question, if we had been called upon to construe it immediately after its passing, there can be no doubt that it received soon after that period an exposition which has been uniformly acted upon in modern times. I refer to the commentary of Lord Coke in 2 Inst. 435. Lord Coke not only gives the construction of the statute, but he grapples with the difficulty which the words of it present. He says: "Albeit the words of this branch [Si sponte reliquerit, et abierit, et moretur cum adultero, &c.] be in the conjunctive, yet, if the woman be taken away, not sponte, but against her will, and after consent, and remain with the adulterer without being reconciled, &c., she shall lose her dower; for, the cause of the bar of her dower is not the manner of the going away, but the remaining with the adulterer in avowtry without reconciliation, that is the bar of the dower." That passage was cited and received as good law in *Hethrington v. Graham*, 6 Bingh. 135 (E. C. L. R. vol. 19), 3 M. & P. 399, where the Court gave a considered judgment. Although I admit that Mr. *Wills* has shown us that the facts of that case were different from those now before us, yet the principle of the decision is undoubtedly founded upon Lord Coke's exposition of the meaning of the statute. If it be true, as is there laid down, that it is not the manner of the going away, but the remaining with the adulterer in avowtry without reconciliation, that is the bar of the dower, the replication in the present case amounts to an admission that she remained with the adulterer without reconciliation, as alleged in the plea. That part of the statute, "Moretur cum adultero," has also received an exposition from the same high authority. "Albeit," says Lord Coke, p. 436, "she doth not continually remain in avowtry with the adulterer, yet if she be with him and commit adultery, it is a tarrying within this statute. \*Also, if she once remain with the adulterer in avow- [\*731 try, and after he keepeth her against her will, or if the avow- terer turn her away, yet she shall be said morari cum adultero within this Act." Upon the facts, therefore, which stand admitted upon the pleadings, it appears to me that the plaintiff did commit adultery, and did remain with the adulterer without reconciliation, and therefore the statute is a bar to her claim to dower.

WILLES, J.—I am of the same opinion. The facts, as they are alleged or stand admitted on the pleadings, are, that the husband treated his wife badly, and she left him, and has ever since lived in adultery with another man. Where a man so conducts himself towards his wife as to render it unsafe or unreasonable that she should be compelled to live with him, he sends her forth with authority to pledge his credit for necessaries. But still she is bound to conduct herself properly. I must say I do not think it can be said in this case that the plaintiff's committing adultery was the consequence of the husband's maltreatment or misconduct. It was the result of her yielding to temptation. Her right to dower turns upon the construction of the Statute of Westminster 2, c. 34. The question is whether, within the words and meaning of this statute, the plaintiff did consent and remain with the adulterer without

being reconciled. If she has done that, she has forfeited her dower. I apprehend that the record shows that she has done so. She has left her husband without, as far as appears, having been taken away by a third person; but she has remained away and lived in adultery. If one looks at the Statute of Rape (6 R. 2, c. 6), and this statute against the carrying away a religious against her will, it will appear that the

\*732] word *sponte* here is used in contradistinction to a forced *\*elopement*. The best construction of the statute seems to be that the leaving *sponte* is not of the essence of the offence which leads to the forfeiture. It is enough, if, having left her husband's house, the woman afterwards commits adultery. Nay, it has been held that the words "*sponte reliquerit, et abierit, et moretur cum adultero*," are satisfied by the mere act of adultery, without remaining any length of time with the adulterer. That is hardly consistent with the earlier construction, in 8 E. 2, fo. 272, which appears to have held the words "shall willingly leave her husband" to be material. The case is sufficiently set out in Rol. Abr. *Dower* (P), pl. 11, and in the corresponding part of Viner,—“If a woman elopes into another county, and lives in adultery in a manor that is of the joint purchase of the baron and feme, without being reconciled, yet this shall not bar her of her dower, because the baron is to see that none such live within his land.” But that impression was afterwards corrected: for, we find it laid down by Lord Coke, 2 Inst. 435, referring to the Year Book, 43 E. 3, fo. 19, that, “albeit the words of this branch lie in the conjunctive, yet if the woman be taken away not *sponte*, but against her will, and after consent, and remain with the adulterer without being reconciled, &c., she shall lose her dower; for the cause of the bar of her dower is, not the manner of the going away, but the remaining away with the adulterer in avowtry without reconciliation, that is the bar of the dower.” Other passages in 2 Inst. are to the same effect. Commenting on the words “*moretur cum adultero*,” Lord Coke says, p. 436,—“Albeit she doth not continually remain in avowtry with the adulterer, yet if she be with him and commit adultery, it is a tarrying within the statute. Also, if she once remain with the adulterer in avowtry, and after he keep her against her will,

\*733] or, if the *\*avowterer* turn her away, yet she shall be said *morari cum adultero* within this Act. If the wife doth elope from her husband's house of habitation, and commit adultery in any other the lands or mannours of her husband, this without the free reconciliation of the husband is within the purview of this statute.” Now, see what he says upon the next branch of the statute. Commenting on the words “*Nisi vir sponte, &c.*,” he says: “Note, that cohabitation is not sufficient without reconciliation made by the husband *sponte*, so as cohabitation only in the same house with the husband availeth her not; à fortiori, though she remain with the avowterer in any of the lands or mannours of her husband, yet she shall be barred of her dower by this branch, without the husband's free reconciliation, albeit it hath been otherwise holden: and the reason that they yielded is, because it is no elopement, whereas, it appeareth before that the words of *reliquerit et abierit* are not of the substance of the bar of dower, but the adultery, and the remaining with the adulterer, as is above said; and albeit she and the adulterer remain within any of the lands or mannours of the husband, yet (the words being, *si uxor sponte reliquerit et abierit*) she

hath left and gone from her husband in that case, which is a personal offence." I think it is impossible more distinctly to lay down the law to be, that, if the wife leaves her husband's house, no matter from what cause, and commits adultery, the penalty imposed by the statute attaches.

BYLES, J.—I have nothing to add, except this, that my acquiescence in the judgment of the Court reposes on the deference one is always bound to pay to the opinions of that very eminent lawyer Lord Coke. I agree with the rest of the Court in thinking that the \*present [\*734 case is not to be distinguished from those which he puts in the passages referred to.

KRATING, J., concurred.

Judgment for the defendant.(a)

(a) There was a third replication (upon which issue was taken), to the following effect:—"That, after the supposed departure, the said John Woodward willingly, and without the coercion of the Church, reconciled himself to the plaintiff, and permitted her to re-cohabit with him."

The Statute of Westminster II., c. 34, has either been adopted as part of the common law, or re-enacted in substance in most of the United States. See Roberts's Digest Brit. Stats. in force in Pennsylvania, 186; 4 Kent's Comm. 53; 1 Greenleaf's Cruise 156, 175; though in *Lecompte v. Wash*, 9 Mis. 551, its provisions were held not to have been in force in Missouri before the statute of 1825 of that state; while on the other hand, in New York it has been held, that since the Revised Statutes, elopement with an adulterer is not a bar to dower, unless followed by a divorce: *Reynolds v. Reynolds*, 24 Wend. 193; and a similar decision has been recently made under the Massachusetts Revised Statutes, *Lakin v. Lakin*, 2 Allen 45.

The decisions under the statutes in this country follow closely those in England. Thus in *Cogswell v. Tibbetts*, 3 N. H. 31, it was held, that the forfeiture depended entirely on the words of the act; that adultery without a willing leaving of the husband, is not enough, and therefore, that where in the absence of the husband, a wife commits adultery at home, it is no bar. In *Stegall v. Stegall*, 2 Brockenbrough 256, however, it was held by Ch. J. Marshall, that it was sufficient if the wife refused to accompany her husband when he went away, and afterwards

committed adultery. He also laid down, that the words "go away and continue with the adulterer," in the Act, were satisfied "by an open state of adultery, whether the woman resided in the same house with her adulterer, or in separate houses; whether in her own or a friend's house, or in his; whether with or without the ceremony of marriage." So under the statute of North Carolina, though the wife does not continually remain in adultery with the adulterer, if she be with him and commit adultery, it is enough; so if she once voluntarily remain with him in adultery, and he afterwards keep her against her will, or turn her off. In like manner, if she has willingly left her husband, subsequent adultery will be a bar; but if driven away by him, or by his compulsion, it is otherwise: *Walters v. Jordan*, 13 Ired. 861. Mere separation, however unjustifiable, without adultery, is also no bar; *Thayer v. Thayer*, 14 Verm. 107.

In *Stegall v. Stegall*, *ut supra*, it was further held, that, as the statute only referred to dower at common law, it did not extend to the distributive share of a widow in personal estate under the intestate laws. *Quære*, Would this apply to states where, as in Pennsylvania, a widow without children is entitled to a greater estate in her husband's lands than dower?

LEAKEY and Others v. LUCAS and Others. *June 20.*

The declaration,—after reciting that certain persons intended to apply to parliament for leave to bring in a bill for making and maintaining waterworks, and incorporating a Company for the supply of water,—set out an agreement between the plaintiffs (an engineer and solicitors) and the defendants (contractors), whereby it was agreed that the defendants should be the contractors to do the proposed works, and should provide the parliamentary deposit, and that, in the event of the intended Act not being obtained, the defendants should pay a sum not exceeding 300*l.* toward the expenses in endeavouring to obtain the Act; and that the plaintiffs should not make any charge for work done or money paid against the provisional directors of the intended Company, or beyond the said 300*l.* against the defendants.

Plea, that the plaintiffs, having incurred costs to the amount of 300*l.* in endeavouring to obtain the Act, refused to continue and ceased from continuing such endeavours, on the ground that no one would provide them with funds to pay the counsel's fees, whereupon it became necessary that the bill should be lost for want of further prosecution, or that the defendants should prosecute it; and that the defendants accordingly employed other solicitors for that purpose, and in so doing incurred costs to an amount greatly exceeding 300*l.*, but that the bill was thrown out. The plea concluded with a general averment that all things had happened to entitle the defendants to employ the last-mentioned solicitors, and to make the said payment a performance by the defendants of the agreement so far as related to the 300*l.* :—

Held, that the plea was a good answer to the action,—the continuance by the plaintiffs of all reasonable endeavours to obtain the bill being a condition precedent to their right to call upon the defendants for the 300*l.*, and the plea showing that they had failed to use such endeavours.

THE first count of the declaration stated, that, before and at the time of the making of the agreement thereafter mentioned, it was intended by divers persons that application should be made to parliament in the \*735] then ensuing session, that is to say, in the session of \*parliament which was held in the 23d and 24th years of the reign of Her Majesty Queen Victoria, for leave to bring in a bill for making and maintaining waterworks for the supply of the inhabitants of divers places in the county of Kent with water, and for incorporating a Company with all necessary powers for that purpose, and, amongst other things, for authorizing the making and constructing of a wharf, engine-house, pumping-station, and divers reservoirs, cuts, trenches, pipes, aqueducts, and other works necessary and proper for the said undertaking: That thereupon, by an agreement in writing, bearing date the 14th of January, 1860, then made by the defendants and the plaintiffs, it was agreed between the defendants (therein described as contractors), the plaintiff Alfred Meeson (therein described as civil engineer), and the other plaintiffs (therein described as solicitors), for the proposed waterworks, that, provided the said intended Act of Parliament should be obtained, the defendants should carry out the whole of the said works, and that the price to be paid to the said contractors for the pipes to be provided and fixed complete, including all charges, should be 11*l.* per ton, and that the said contractors should perform the remainder of the works of every description that should be required to be done at prices in the same proportion, such last-mentioned prices to be settled by the plaintiff Alfred Meeson in case any dispute concerning the same should arise; and that the said contractors should take payment for the said works as follows, that is to say, one-eighth of the amount in paid up shares of the said intended Company, and the remainder in cash; and that the said contractors should provide the parliamentary deposit, which should be returned to them in full at the earliest period; and that, in the event of

the said intended Act of Parliament not being obtained, the said [\*736 \*contractors should pay a sum not exceeding 800*l.* towards the expenses in endeavouring to obtain the said Act; and that the said engineer and solicitors should not make any charge for work done or money paid against the provisional directors of the said intended Company, or beyond the said 800*l.* as aforesaid against the said contractors; but that nothing in the said agreement should prevent the said solicitors and engineer from receiving their proper charges out of the funds of the said intended Company: Averment, that the said intended Act of Parliament had never been obtained, and that all matters and things had been done and had happened, and all times had elapsed necessary to entitle the plaintiffs to maintain this action, and to recover from the defendants the said sum of 800*l.*, yet the defendants had not paid the said sum, or any part thereof, &c.

Second plea to the first count,—that, after the making of the said agreement, and while the defendants and the plaintiffs were prosecuting in parliament the said bill, and before it was known whether the said bill would or would not be passed into an Act, the plaintiffs James Shirley Leakey, George Chapman, and Charles Harwood Clarke, having incurred costs to the amount of 300*l.* in endeavouring to obtain the said Act, refused to continue and ceased from continuing such their endeavours, and did not nor would make any further endeavour to obtain the said Act, upon the ground that no one would provide them with funds to pay counsel's fees and fees of the Houses of Parliament; whereupon it became necessary either that the said Act should be lost for want of further prosecution of the said bill, or that the defendant should prosecute the same; and thereupon the defendants necessarily employed other solicitors, to wit, Messrs. Gregory & Co., to prosecute the said bill, and thereby endeavour to \*obtain the said Act, and did by the said [\*737 Messrs. Gregory & Co., as their solicitors reasonably prosecute the said bill in parliament, and thereby reasonably endeavour to obtain the said Act, until the said bill was thrown out in the House of Lords and was lost, and the obtaining of the said Act became impossible: That, in and by their said endeavours, the defendants incurred and became liable to pay divers costs and charges to the said Messrs. Gregory & Co. for work done and disbursements made by the said Messrs. Gregory & Co. for the defendants, at their request, in and about so prosecuting the said bill and endeavouring to obtain the said Act, amounting to a large sum, exceeding 800*l.*, to wit, 697*l.* 3*s.*, which last-mentioned sum, after the said bill was lost as aforesaid, and before this suit, the defendants paid to the said Messrs. Gregory & Co., such payment being a payment made by the defendants towards the expenses in endeavouring to obtain the said Act according to and in fulfilment and performance of their said agreement: That the said expenses which they so paid to the amount of 800*l.* and upwards were necessary and reasonable expenses, and were incurred by reason of the said plaintiffs James Shirley Leakey, George Chapman, and Charles Harwood Clarke having ceased and omitted to endeavour to obtain the said Act as aforesaid: That the said James Shirley Leakey, George Chapman, and Charles Harwood Clarke so ceased and omitted as aforesaid without the consent and against the will of the defendants: and that all things necessary happened to entitle the defendants to employ the said Messrs. Gregory & Co. as

aforesaid, and by them to endeavour to obtain the said Act as aforesaid, and to make the said payment a performance by the defendants of the said agreement so far as it related to the said sum of 300*l*.

\*738] The plaintiffs demurred to the second plea, the \*ground of demurrer stated in the margin being, "that the alleged payment by the defendants to the said Messrs. Gregory & Co. was no performance by the defendants of their said agreement with the plaintiffs." Joinder.

*Mellish*, Q. C., for the plaintiffs.(a)—The question is, whether it is a condition precedent to the plaintiffs' right to recover the 300*l*., that they should have incurred, or been willing to incur, all the expenses of \*739] \*soliciting the bill until it was obtained or rejected, or whether they are not entitled in any event to call upon the defendants for contribution to the extent stipulated for. The plea admits that expenses having been incurred by the plaintiffs exceeding 300*l*. If the carrying on the matter to a termination one way or the other was intended to be a condition precedent, it would have been easy so to express it.

*Kay* (with whom was *Bovill*, Q. C.), contra.(b)—The plea in substance

(a) The points marked for argument on the part of the plaintiffs were as follows:—

"That the second plea is bad, because the agreement gave the plaintiffs a right to claim payment of the 300*l*. in the event of the bill being thrown out by the legislature for some other cause than the plaintiffs' default, after they had incurred costs to the amount of 300*l*. in endeavouring to obtain the Act:

"That the agreement did not bind the plaintiffs to find funds for the prosecution of the bill until its rejection by the legislature:

"That the plea confesses the happening of the contingency upon which the defendants' liability to pay the 300*l*. depended, without avoiding the effect of such confession:

"That the costs and expenses of the defendants in and about prosecuting the bill after the plaintiffs' refusal to proceed further in the matter, were incurred solely on the defendants' behalf; and the payment of such expenses to Messrs. Gregory & Co. cannot be set against the 300*l*. already incurred and expended by the plaintiffs in endeavouring to obtain the Act, and of which the defendants had the benefit in their further prosecution of the bill:

"That it is not expressly provided by the agreement, nor is it implied by its terms, that such a payment as that alleged in the plea to have been made by the defendants should be a payment or equivalent to a payment of the 300*l*. to the plaintiffs:

"That it is not stated in the plea either that the plaintiffs assented to such payment being made to Messrs. Gregory & Co. on the plaintiffs' behalf or otherwise, or that the plaintiffs accepted it as a payment in performance of the defendants' agreement:

"That the plea cannot consistently with the rules of pleading be read as a plea of the plaintiffs' non-performance of the agreement; but that, if it can be so read, it is bad, for that the plea confesses the plaintiffs' performance of the agreement and the happening of the contingency upon which the defendants' liability depended, and alleges nothing in avoidance thereof:

"And that the plea admits the performance of the agreement by the plaintiffs, and an enjoyment of such performance by the defendants."

(b) The points marked for argument on the part of the defendants were as follows:—

"That the declaration states the legal effect of the agreement, and nothing is to be assumed in favour of the plaintiffs beyond what they allege; and that the legal effect is, not that the defendants are to pay 300*l*. to the plaintiffs absolutely, but that they are to pay it towards the expenses:

"That the plaintiffs might have earned the 300*l*. by doing all the work; but, that, if others did the work on the defendants' retainer, there is no reason why the defendants should not pay the others, especially when the necessity for employing others was occasioned by the plaintiffs' default:

"That the agreement does not mean that the solicitors might first incur costs to the amount of 300*l*., and then throw up the bill, and retain a right to the 300*l*. though they placed the defendants in the position of necessarily losing the bill or prosecuting it at their own expense:

"That, so far from the plaintiffs being entitled to sue the defendants for 300*l*., it is more reasonable that the defendants should sue such of the plaintiffs as are solicitors for the excess above 300*l*. which the defendants have had to pay; for, that the agreement means that 300*l*.

amounts to a plea of performance. The agreement which is entered into between contractors, \*engineers, and solicitors, with reference to a scheme in which all were interested, stipulates what [\*740 each of them is to do. The defendants on their part contract to pay 300*l.* towards the expenses of soliciting and obtaining the proposed Act. The plea states, that, before it was known whether the bill would or would not be passed into an Act, the plaintiffs refused to continue their endeavours to obtain the Act, upon the ground that no one would furnish them funds to pay the necessary fees; and that the defendants thereupon necessarily employed other solicitors to prosecute the bill and endeavour to obtain the Act, and did so prosecute the bill until it was thrown out and lost; and that, in so doing, they incurred costs to the solicitors so employed by them to an amount far exceeding the sum they agreed to pay. Having thus paid the 300*l.* in one direction, there is no pretence for calling upon them to pay it over again. The agreement does not state to whom the 300*l.* was to be paid: but, generally, that the defendants "should pay a sum not exceeding 300*l.* towards the expenses in endeavouring to obtain the Act." For what do they contract to pay that sum? For doing the work necessary to the obtaining or endeavouring to obtain the Act: and they are to pay it only in the event of the plaintiffs' *bonâ fide* attempting to obtain the Act, and \*from no default or neglect of their own failing to do so. The [\*741 general averment at the end makes the plea abundantly sufficient. In *Thorpe v. Thorpe*, 1 Salk. 171, Holt, C. J., says: "In all executory contracts, if the agreement be that one shall do an act and for the doing thereof the other shall pay, the doing of the act is a condition precedent to the payment, and the party who is to pay shall not be compelled to part with his money till the thing be performed for which he is to pay. But, if a day be appointed for payment of the money, and the day is to happen before the thing can be performed, an action may be brought for the money before the thing be done; for, it appears the party relied upon his remedy upon the contract, and intended not to make the performance a condition precedent. Where, however, a certain day of payment is appointed, and that day is to happen subsequent to the performance of the thing to be done by the contract, in such performance is a condition precedent, and must be averred in an action for the money: and some books which are to the contrary are not law; for, every man's bargain ought to be performed as he intended it."

*Mellish*, in reply.—The context clearly shows that the 300*l.* was to be paid to the plaintiffs. Their employment of Messrs. Gregory & Co. was the defendants' own voluntary act. Their liability to them, therefore, can be no answer to the plaintiffs' claim under this agreement.

WILLIAMS, J.—I am of opinion that the plea is a good one, and that our judgment must be for the defendants. The declaration,—after reciting that certain persons intended to apply to parliament for leave to bring in a bill for making and maintaining waterworks, and incorporating a Company for the supply of \*water,—sets out the agree- [\*742 ment upon which the action is founded. The material terms of

was to be the limit of the defendants' liability, and the default of the solicitors has thrown on the defendants the necessity of paying more:

"And that, if the agreement means that the bill was to be prosecuted, and that the defendants were not to pay more than 300*l.*, it must be implied that any necessary excess above that sum was to be borne by the plaintiffs."

the agreement are, that the defendants should be the contractors to do the proposed works, and should provide the parliamentary deposit. Thus far the agreement contemplates the advantages to be derived by all parties from the passing of the Act. Then comes the part of it which has reference to what shall be done if the application to parliament should be unsuccessful,—“and that, in the event of the intended Act not being obtained, the contractors (the defendants) should pay a sum not exceeding 300*l.* towards the expenses in endeavouring to obtain the said Act;” and that the engineer and solicitors (the plaintiffs) should not make any charge for work done or money paid against the provisional directors of the said intended Company, or beyond the said 300*l.* against the defendants; but that nothing in the said agreement should prevent the said solicitors and engineer from receiving their proper charges out of the funds of the said intended Company. The agreement, therefore, appears to amount to this,—that the plaintiffs undertake the labour of soliciting the bill, and that, in the event of the application for it failing, they are to make no charge for their work or pecuniary expenditure upon any one else, and upon the defendants only to the extent of 300*l.* The real contest is, whether the meaning of the agreement is that the plaintiffs were to make all advances,—to provide the sinews of war,—for carrying on the work of soliciting the bill, or were merely to give their personal exertions towards the attainment of the common object. It appears to me, that, inasmuch as nothing is said about providing funds from any other quarter, and the agreement stipulates that it is only in the event of their efforts to obtain the Act being \*743] unsuccessful that the plaintiffs were to call upon the defendants \*for 300*l.*, they (the plaintiffs) were bound to make all proper endeavours and to provide the pecuniary means for that purpose. Upon these facts, therefore, appearing upon the record, I am of opinion that the plaintiffs have not entitled themselves to demand the 300*l.*, because that sum was only to become payable to them in the event of their having used their best endeavours to get the Act, and failing. The event has not happened which was to entitle them to call upon the defendants for the 300*l.* The question then arises, whether it is sufficiently alleged that the plaintiffs were wrong in ceasing to continue their labours in soliciting the bill. The plea alleges that the plaintiffs, having incurred costs to the amount of 300*l.* in endeavouring to obtain the Act, refused to continue and ceased from continuing such endeavours, on the ground that no one would provide them with funds to pay the requisite fees, whereupon it became necessary that the bill should be lost for want of further prosecution, or that the defendants should prosecute it; and that they accordingly employed other solicitors for that purpose, and, in so doing, incurred costs to an amount exceeding 300*l.*, but that the bill was thrown out. I think it does sufficiently appear that the plaintiffs ceased to solicit the bill without having made reasonably sufficient endeavours to obtain the Act, and consequently that the condition precedent to their right to claim the 300*l.* from the defendants never was performed by them.

WILLES, J.—I am of the same opinion. In order to sustain their plea, the defendants must be prepared to prove that there were some steps necessary to be taken by the plaintiffs in endeavouring to obtain the bill which they omitted to take.

BYLES, J.—I am of the same opinion. The allegation \*in the plea, that the plaintiffs did not nor would make any further [\*744 endeavour to obtain the said Act, upon the ground that no one would provide them with funds to pay counsel's fees, &c., whereupon it became necessary either that the bill should be abandoned, or that the defendants themselves should take up the prosecution of it, is a very material allegation. The plaintiffs in effect say, if anybody will supply the funds, we will go on; otherwise, we will abandon the bill. The conduct of the plaintiffs compelled the defendants to adopt the course they did.

KEATING, J.—I have entertained some doubt: but, upon the whole, I concur with the rest of the Court. The fair construction of the agreement, I think, is, that the plaintiffs did undertake to do all that was necessary to obtain the Act. If that were not so, one can hardly see the necessity for an agreement at all. The plea, therefore, which alleges that reasonable efforts to obtain the bill were not made, appears to me to be a good answer. Judgment for the defendants.

\*BUCKMASTER and Another v. RUSSELL. June 21. [\*745

In answer to an application for a debt barred by the Statute of Limitations, the defendant wrote,—“ I have received a letter from Messrs. P. & L., solicitors, requesting me to pay you an account of 40*l.* 9*s.* 6*d.* I have no wish to have anything to do with the lawyers; much less do I wish to deny a just debt. I cannot, however, get rid of the notion that my account with you was settled in 1851: but as you declare it was not settled, I am willing to pay you 10*l.* per annum until it is liquidated. Should this proposal meet with your approbation, we can make arrangements accordingly :”—Held, that this was not such an absolute unqualified acknowledgment and unconditional promise to pay as to take the case out of the Statute of Limitations.

THIS was an action for goods sold and delivered. Plea, never indebted, and the Statute of Limitations.

The cause was tried before Williams, J., at the sittings in Middlesex after last Hilary Term, when a question arose as to whether a letter written by the defendants to the plaintiffs, in answer to one which he had received from the plaintiffs' solicitors demanding payment of the alleged debt, was a sufficient acknowledgment to take the case out of the statute. The defendant's letter was as follows:—

“ Dennington, Barnstaple, Devon.

“ April 2d, 1860.

“ Gentlemen,—I have received a letter from Messrs. Peard & Langdon, solicitors, of Barnstaple, requesting me to pay you an account of 40*l.* 9*s.* 6*d.* I have no wish to have anything to do with the lawyers; much less do I wish to deny a just debt. I cannot, however, get rid of the notion that my account with you was settled when I left the army in 1851. But, as you declare it was not settled, I am willing to pay you 10*l.* per annum until it is liquidated. Should this proposal meet with your approbation, we can make arrangements accordingly.

R. B. RUSSELL.”

The proposal did not meet the approbation of the plaintiffs; but their reply was not put in at the trial. This action was commenced in July, 1860,—

A verdict having been found for the defendant, with leave to the plaintiffs to move to enter a verdict for them for 26*l.* 10*s.*,

\*746] \**Parry*, Serjt., in Easter Term last, obtained a rule nisi accordingly.

*Karslake*, Q. C., now showed cause.—The letter was not a sufficient acknowledgment to take the case out of the statute. In *Tanner v. Smart*, 6 B. & C. 603, 9 D. & R. 549 (E. C. L. R. vol. 22), “I cannot pay the debt at present, but I will pay it as soon as I can,” was held not to be a sufficient acknowledgment, in the absence of proof of the defendant’s ability to pay. In *Rackham v. Marriott*, 1 Hurlst. & N. 234,† in answer to an application for payment of a debt, the defendant wrote as follows:—“I do not wish to avail myself of the Statute of Limitations to refuse payment of the debt. I have not the means of paying, and must crave a continuance of your indulgence. My situation as clerk does not afford me the means of laying by a shilling: but, in time, I may reap the benefit of my services in an augmentation of salary that may enable me to propose some satisfactory arrangement. I am much obliged to you for your forbearance:” and it was held that this was no sufficient acknowledgment or promise to take the case out of the statute. And this was affirmed on appeal: 2 Hurlst. & N. 196.† The same principle was laid down in *Smith v. Thorne*, 18 Q. B. 134 (E. C. L. R. vol. 83). T. owed P. & Co., before their bankruptcy, 275*l.*, as surviving partner of T., Y. & Y., and 6565*l.* due independently of that partnership. As part security for the latter debt, he had given P. & Co. a mortgage for 5000*l.* The plaintiff, the official assignee of P. & Co., wrote to T.,—“By the books of the bankrupts, there is a balance of 275*l.* standing against you,” and requested immediate payment. T. replied,—“You have no occasion to blame yourself respecting any claim on me from the estate of P. & Co. The matter has been arranged with \*747] the assignees here [Sheffield]; and at the last \*meeting it was arranged that I should pay 450*l.* on the 20th of May, 450*l.* on the 20th of August, 450*l.* on the 20th of November, and 450*l.* on the 20th of February next; after which I am in hopes that I shall be able to transfer the 5000*l.* mortgage, to enable me to clear off the whole that may be standing against me.” It was admitted that the instalments of 450*l.* were to be paid in respect of the debt of 6565*l.*, that the mortgage mentioned in the letter was the mortgage for 5000*l.* given as part security for that debt, that the 275*l.* mentioned by the official assignee was the debt due to P. & Co. from T. as surviving partner of T., Y. & Y., and that T. had paid off the 6565*l.* before the present action was brought against the defendants, his executors. It was held, on error and bill of exceptions, that the Judge was right in directing the jury that the two letters did not amount to a sufficient acknowledgment or promise to take the debt of 275*l.* out of the Statute of Limitations, the letter not containing any absolute acknowledgment of a debt, or unqualified promise to pay, but only expressing a hope, that, on the transfer of the mortgage, T. might be able to clear off the whole that might be standing against him. Parke, B., giving the judgment of the Court of error, says: “There has been no question, since *Tanner v. Smart*, that an acknowledgment of a debt must, in order to take it out of the operation of the Statute of Limitations, be sufficient to support the promise laid in the declaration, namely, to pay on request. By stat. 9 G. 4, c. 14,

that acknowledgment must now be in writing; but it must still support a promise to pay on request, either by showing on the face of it an unconditional promise to pay, or by the collateral fact of the performance of the condition or the occurrence of the event by which the promise is qualified." Trying this letter by that test, there is no unconditional \*admission of a debt being due, and no promise to pay on request, or on the performance of a condition or the occurrence of an event which has been performed or has happened. It was a mere proposal, to purchase peace, which was rejected. [\*748]

*Lucius Kelly* (with whom was *Parry*, Serjt.), in support of the rule.—The letter of the defendant contains a clear admission that the debt was still due: the only question is whether the subsequent part of it amounts to an absolute or a conditional promise to pay. To the extent of 10*l.*, at all events, the defendant bound himself. [WILLES, J.—It was no promise until the terms were assented to. WILLIAMS, J.—The defendant could not be bound by the terms of his letter, until the plaintiffs had bound themselves by assenting to his proposal.] In *Collis v. Stack*, 1 Hurlst. & N. 605,† it is said that the question in these cases is, whether the statement as to the time of payment is merely an excuse or the condition on which payment is to be made. There, the plaintiff having applied to the defendant for payment of a debt, the latter wrote in answer, "I shall repeat my assurance to you of the certainty of your being repaid your generous loan. Let matters remain as they are for a short time, and all will be right. The works I have been appointed to; but they are not yet worked with the full complement of labour: this term will decide the matter:" and it was held that this was a sufficient acknowledgment in answer to a plea of the Statute of Limitations,—Pollock, C. B., saying,—“No particular form of words is required to constitute such a promise. ‘All will be right’ must be understood by everybody to mean ‘You will be paid.’” In *Hart v. Prendergast*, 14 M. & W. 741,† Parke, B., says: “This evidence is to prove a promise to pay on request. An unconditional \*acknowledgment is good evidence for that purpose, because you would infer from it that the party meant to pay on request. But, if he annexes any qualification or condition, that is not a sufficient acknowledgment, without proof of the performance of it.” That no doubt is the correct principle. *Sidwell v. Mason*, 2 Hurlst. & N. 306,† is exactly in point. The plaintiff within six years had sent in his bill to the defendant: the latter wrote in answer as follows,—“I have received your bill. It does not specify sufficiently to which cottages the work is done; for instance (as to some of the items), I do not know where all this is done. I shall feel obliged if you will more particularly explain. It is my wish to settle your account immediately, but, being at a distance, I wish everything very explicit and correct. I have asked H. to mark the agreements and send them to me, and I will return them by the first post, with instructions to pay, if correct.” It was held that this letter was a sufficient acknowledgment to take the debt out of the Statute of Limitations. Upon the case of *Rackham v. Marriott* being cited, Pollock, C. B., observed: “There was considerable doubt in the minds of several members of the Court whether the acknowledgment in *Rackham v. Marriott* was not sufficient. I consider it an extreme case.”

WILLIAMS, J.—I am of opinion that this rule should be discharged.

The principle upon which an acknowledgment of a debt operates to bar the Statute of Limitations has been settled ever since the case of *Tanner v. Smart*, 6 B. & C. 603 (E. C. L. R. vol. 17), 9 D. & R. 549 (E. C. L. R. vol. 22), and has been fully expressed on different occasions since in Courts of common law; but it has never been better expressed than it was by Vice-Chancellor Wigram in *Philips v. Philips*, 3 Hare 281, 299, \*750] where that very \*learned Judge with characteristic lucidity says: "The legal effect of an acknowledgment of a debt barred by the Statute of Limitations is that of a promise to pay the old debt, and for this purpose the old debt may be said to be revived. It is revived as a consideration for a new promise. But the new promise, and not the old debt, is the measure of the creditor's right. If a debtor simply acknowledges an old debt, the law implies from that simple acknowledgment a promise to pay it; for which promise the old debt is a sufficient consideration. But, if the debtor promises to pay the old debt when he is able, or by instalments, or in two years, or out of a particular fund, the creditor can claim nothing more than the promise gives him." That is the true principle. The question is, whether the letter in this case contains an acknowledgment from which a promise can be implied to pay the debt which was barred by the statute. Now, it is obvious that the promise is of a nature not to bind the defendant unless it was accepted by the persons to whom it was proffered; for, it would be unjust to hold the one party bound by the offer, unless it were assented to by the other party. The simple question, therefore, is, whether, independently of the special promise, there is an absolute and unqualified acknowledgment of the existence of the debt, from which a promise to pay can fairly be implied. I am of opinion that there is not. There clearly is no acknowledgment at all. The writer states his impression to be that the alleged debt has no existence. There is therefore nothing from which a promise to pay can be implied.

WILLES, J.—I am of the same opinion. The creditors renounced the promise to the debtor as a promise to pay by instalments; for, they rejected his proposal. They now seek to rely upon it as an acknowledgment \*751] and a general promise to pay a debt barred by the statute. That they clearly cannot be allowed to do.

BYLES, J.—I am of the same opinion. Before the case of *Tanner v. Smart*, it was supposed that any acknowledgment was sufficient to take a case out of the Statute of Limitations: and it was even carried to this extent, that an acknowledgment of the debt *after the commencement of the action* was sufficient,—*Yea v. Fouraker*, 2 Burr. 1099. But, in *Tanner v. Smart*, it was finally established that the promise to pay is not so much a revival of the old debt, but creates a new cause of action. If in this case the proposed condition had been assented to, an action might have lain for a part of the money. But, inasmuch as the condition was not complied with, the plaintiffs have no ground of action in any form.

KEATING, J., concurred.

Rule discharged.

**\*DAVIS v. NISBETT. May 31.**

[\*752]

The second count of the declaration stated, that, in consideration that the plaintiff then agreed with the defendant to sell and transfer to him by the 22d of January then next the lease of a farm for 500*l.*, and the implements, stock, &c., at a valuation to be thereafter made, the defendant agreed to purchase the same upon the terms aforesaid, *subject to his being approved of as a tenant by Lord S.*, and also, among other things, then at and upon the making of the agreement to pay down to the plaintiff 500*l.* as a deposit, and to complete the purchase and pay the amount of the valuation by the said 22d of January; that, the defendant being unable to pay the 500*l.* at and upon the making of the said agreement, in consideration that the plaintiff, at the request of the defendant, dispensed with the said payment down of the 500*l.* and would take the defendant's I. O. U. for the same, the defendant promised the plaintiff that he would pay him the 500*l.* as soon as he could write to his banker at Berwick and procure his said banker to remit the same: General averment, and breach that the 500*l.* was not paid:—Held, that the count disclosed a sufficient consideration for the defendant's promise.

Fifth plea,—that, before the defendant could procure his said banker to remit as alleged, and before any demand of payment of the I. O. U. by the plaintiff, the defendant was disapproved of as a tenant by Lord S.:—Held, that the plea was a good answer to the second count.

Sixth plea,—on equitable grounds,—that, before the commencement of the action, and before any demand by the plaintiff of payment of the I. O. U., the defendant was disapproved of as a tenant by Lord Salisbury, and the plaintiff was thereby rendered unable to sell and transfer the lease to the defendant:—Held, not a good equitable defence, inasmuch as the plea disclosed no ground upon which the defendant could be entitled to an injunction in a Court of equity.

Replication to the sixth plea,—that it was part of the agreement that the 500*l.* should be forfeited in case of non-completion of the agreement by the defendant on the said 22d of January; that it was arranged and agreed between the plaintiff and defendant, that, for the purpose of obtaining the defendant's being approved as a tenant by Lord S., the defendant should apply to Lord S. to accept him as such tenant; and that, before any disapproval of Lord S. as in that plea mentioned, the defendant wrote and applied to Lord S. to accept him as such tenant, and afterwards, and before any such disapproval as in the plea mentioned, the defendant withdrew such application, and declined to be accepted as such tenant by Lord S.; and that such disapproval of Lord S. as in the plea mentioned was procured and occasioned by the act of the defendant, and from his unwillingness to fulfil the agreement, and not otherwise:—Held, that, assuming the sixth plea to be an answer to the second count, the replication was a good answer to the plea.

THIS was an action for the breach of an agreement for the sale of a lease of a farm.

The second count of the declaration stated, that theretofore, on the 23d of November, 1860, in consideration that the plaintiff then agreed with the defendant to sell and transfer to the defendant by the 22d day of January then next the lease of a certain farm called New Park Farm, for a certain sum, to wit, 500*l.*, and the implements, machinery, live stock, hay, corn, straw, fixtures, fittings of planned furniture, and straw cultivator, at a valuation to be thereafter made thereof, the defendant agreed with and promised the plaintiff to purchase the same upon the terms aforesaid, *subject to his being approved of as a tenant by Lord \*Salisbury*; and also, amongst other things, then at and upon the making of the said agreement to pay down to the plaintiff the sum of 500*l.* as a deposit, and to complete the purchase and pay the amount of the valuation by the said 22d day of January then next: Averment, that the said agreement was made and signed by the defendant, and that the defendant being unable to pay the said sum of 500*l.* at and upon the making thereof, in consideration that he the plaintiff, at the request of the defendant, dispensed with the said payment down at the time of the said sum of 500*l.*, and agreed to take

[\*753]

the I. O. U. of the defendant for the same, the defendant promised the plaintiff that he would pay to the plaintiff the said sum of 500*l.* at a certain time thereafter, to wit, as soon as he could write to his banker at Berwick and procure his said banker to remit the same: And although the time for payment of the said sum of 500*l.* pursuant to the said last-mentioned promise, and all times necessary to entitle the plaintiff to recover the said sum of 500*l.*, and to maintain this suit for the recovery thereof, had elapsed before this suit, and all conditions precedent and things had happened to entitle the plaintiff to maintain this suit; yet the defendant had not paid the said sum of 500*l.* in that count mentioned, or any part thereof; and, although payment of the same was demanded of him by the plaintiff before this suit, the defendant had wholly neglected and refused to pay the same.

Fifth plea, to the second count, that, before the defendant could procure his said banker to remit as alleged, and before any demand of payment of the said I. O. U. by the plaintiff, he the defendant was disapproved of as a tenant by Lord Salisbury.

To this plea the plaintiff demurred, the cause of demurrer stated in \*754] the margin being "that the \*disapproval of Lord Salisbury alleged, not being a condition precedent, affords no answer to the claim for 500*l.*" Joinder.

Sixth plea "on equitable grounds" to the second count, that, before the commencement of this action, and before any demand by the plaintiff of payment of the said I. O. U., the defendant was disapproved of as a tenant by Lord Salisbury, and the plaintiff was thereby rendered unable to sell and transfer the said lease to the defendant.

To this plea also the plaintiff demurred, the cause of demurrer stated in the margin being, "that the plea confesses a breach, and does not in any way avoid or answer it, and it does not show how Lord Salisbury's disapproval arose." Joinder.

Replication to the sixth plea,—that it was part of and provided by the said agreement, that the said sum of 500*l.* should be absolutely forfeited to the plaintiff by the defendant in case of non-completion of the said agreement by him the defendant on the said 22d of January; that it was arranged and agreed between the plaintiff and the defendant, that, in order and for the purpose of obtaining the defendant's being approved as a tenant by Lord Salisbury, he the defendant should apply to and request of Lord Salisbury to accept him as such tenant; and that thereupon, and before any disapproval of Lord Salisbury as in that plea mentioned, the defendant accordingly wrote and applied to Lord Salisbury to accept him as such tenant; and that afterwards, and before any such disapproval as in that plea mentioned, the defendant withdrew such application, and declined to Lord Salisbury to be accepted as such tenant by Lord Salisbury, and by his, the defendant's, own act, and without any default or act of the plaintiff, procured Lord Salisbury to disapprove of him the defendant, as tenant as in the said plea is mentioned; \*and that such disapproval of Lord Salisbury as in that \*755] plea mentioned was procured and occasioned by the acts and procurement of the defendant, and from his refusal and unwillingness to carry into effect and fulfil the said agreement, and not otherwise.

The defendant demurred to this replication, the grounds of demurrer stated in the margin being, "that the replication is a departure from

the second count of the declaration; and that the defendant's declining to be accepted as a tenant is no ground for Lord Salisbury disapproving of him as such." Joinder.

*Dowdeswell*, for the plaintiff.(a)—Both pleas are bad. \*The [\*756 action is brought for the breach of an agreement for the sale of the plaintiff's interest in a farm, subject to the purchaser's being approved of as a tenant by Lord Salisbury. The contract was entered into on the 23d of November, 1860; and the transfer was to take place on the 22d of January, 1861. The action was commenced before the last-mentioned day. The defendant contracted to pay 500*l.* down; but, as he was unprepared to do so, the plaintiff consented not to enforce that part of the agreement, until the defendant had had time to write to his banker at Berwick to remit him the money. Any consideration will support such a promise as this. "It is not necessary that the vendor should be actually in a situation to perform his contract at the time it is entered into, provided he is able in proper time to place himself in that situation. And therefore the fact of there being imperfections in the title at the time of the contract will form no ground of objection thereto, if such imperfections can be removed before the time for completing the purchase:" Chitty on Contracts, 6th edit. 279. Assuming, therefore, that the plaintiff was unable at the time to obtain the consent of Lord Salisbury to the defendant's becoming tenant of the farm, that would not disentitle the plaintiff to recover the 500*l.* If, \*when [\*757 the day arrived for giving the defendant possession, the plaintiff was unable to procure the consent of Lord Salisbury, the defendant might be entitled to recover back the money: but, until that day, the disapproval, which might at any time be recalled, would be no answer to the plaintiff's claim. The fifth plea, therefore, is clearly bad. The sixth plea is also bad. It is not alleged that the disapproval of Lord Salisbury was intimated before the lapse of a reasonable time for the defendant to get a remittance from Berwick. This plea professes to be

(a) The points marked for argument on the part of the plaintiff were as follows:—

*Upon the demurrers to the pleas.*—"1. That the fifth and sixth pleas confess a breach, but contain no avoidance of it; that the obtaining of Lord Salisbury's consent was not a condition precedent to the plaintiff's being entitled to recover it, and he was by the agreement entitled to receive the 500*l.* down instant, and the fresh agreement was founded upon a perfectly distinct consideration, viz., that he would dispense with the present payment, and take the defendant's I. O. U.; that this agreement was a perfectly distinct and separate agreement from the first, and the plaintiff is entitled to recover for a breach of it; that, even if the facts stated would have afforded an answer to the original, it affords no answer to the second contract, by which the plaintiff gave up his rights under that; that, even if the claim rested upon the original agreement, the plea affords no answer, as the obtaining of Lord Salisbury's consent was to be a matter subsequent, and the plaintiff then was entitled to have the money down and the use of it until it was finally ascertained that Lord Salisbury would not accept the defendant; that the disapproval of Lord Salisbury alleged affords no answer, as it does not show, that, before the expiration of the stipulated period, Lord Salisbury had not withdrawn it, and approved him, or might have done so; that a Court of equity would not in such a case as that stated in the sixth plea award a perpetual injunction; and that the defendant was at all events bound to show under what circumstances the alleged disapproval had been expressed, and that it was continuing, and that the defendant was in no way in default."

*Upon the demurrer to the replication.*—"That the Court of equity would never issue a perpetual injunction to restrain the plaintiff under the circumstances stated from proceeding to recover the 500*l.*, at all events unconditionally, and deprive him of a remedy for any loss the defendant's own misconduct may have entailed; that the principle *volenti non fit injuria* applies, and the defendant cannot avail himself of his own act to avoid the contract; and that the plea to which it is pleaded is bad in substance."

the I. O. U. of the defendant for the same, the defendant promised the plaintiff that he would pay to the plaintiff the said sum of 500*l.* at a certain time thereafter, to wit, as soon as he could write to his banker at Berwick and procure his said banker to remit the same: And although the time for payment of the said sum of 500*l.* pursuant to the said last-mentioned promise, and all times necessary to entitle the plaintiff to recover the said sum of 500*l.*, and to maintain this suit for the recovery thereof, had elapsed before this suit, and all conditions precedent and things had happened to entitle the plaintiff to maintain this suit; yet the defendant had not paid the said sum of 500*l.* in that count mentioned, or any part thereof; and, although payment of the same was demanded of him by the plaintiff before this suit, the defendant had wholly neglected and refused to pay the same.

Fifth plea, to the second count, that, before the defendant could procure his said banker to remit as alleged, and before any demand of payment of the said I. O. U. by the plaintiff, he the defendant was disapproved of as a tenant by Lord Salisbury.

To this plea the plaintiff demurred, the cause of demurrer stated in \*754] the margin being "that the \*disapproval of Lord Salisbury alleged, not being a condition precedent, affords no answer to the claim for 500*l.*" Joinder.

Sixth plea "on equitable grounds" to the second count, that, before the commencement of this action, and before any demand by the plaintiff of payment of the said I. O. U., the defendant was disapproved of as a tenant by Lord Salisbury, and the plaintiff was thereby rendered unable to sell and transfer the said lease to the defendant.

To this plea also the plaintiff demurred, the cause of demurrer stated in the margin being, "that the plea confesses a breach, and does not in any way avoid or answer it, and it does not show how Lord Salisbury's disapproval arose." Joinder.

Replication to the sixth plea,—that it was part of and provided by the said agreement, that the said sum of 500*l.* should be absolutely forfeited to the plaintiff by the defendant in case of non-completion of the said agreement by him the defendant on the said 22d of January; that it was arranged and agreed between the plaintiff and the defendant, that, in order and for the purpose of obtaining the defendant's being approved as a tenant by Lord Salisbury, he the defendant should apply to and request of Lord Salisbury to accept him as such tenant; and that thereupon, and before any disapproval of Lord Salisbury as in that plea mentioned, the defendant accordingly wrote and applied to Lord Salisbury to accept him as such tenant; and that afterwards, and before any such disapproval as in that plea mentioned, the defendant withdrew such application, and declined to Lord Salisbury to be accepted as such tenant by Lord Salisbury, and by his, the defendant's, own act, and without any default or act of the plaintiff, procured Lord Salisbury to disapprove of him the defendant, as tenant as in the said plea is mentioned; \*and that such disapproval of Lord Salisbury as in that \*755] plea mentioned was procured and occasioned by the acts and procurement of the defendant, and from his refusal and unwillingness to carry into effect and fulfil the said agreement, and not otherwise.

The defendant demurred to this replication, the grounds of demurrer stated in the margin being, "that the replication is a departure from

the second count of the declaration; and that the defendant's declining to be accepted as a tenant is no ground for Lord Salisbury disapproving of him as such." Joinder.

*Dowdeswell*, for the plaintiff.(a)—Both pleas are bad. \*The [\*756 action is brought for the breach of an agreement for the sale of the plaintiff's interest in a farm, subject to the purchaser's being approved of as a tenant by Lord Salisbury. The contract was entered into on the 23d of November, 1860; and the transfer was to take place on the 22d of January, 1861. The action was commenced before the last-mentioned day. The defendant contracted to pay 500*l.* down; but, as he was unprepared to do so, the plaintiff consented not to enforce that part of the agreement, until the defendant had had time to write to his banker at Berwick to remit him the money. Any consideration will support such a promise as this. "It is not necessary that the vendor should be actually in a situation to perform his contract at the time it is entered into, provided he is able in proper time to place himself in that situation. And therefore the fact of there being imperfections in the title at the time of the contract will form no ground of objection thereto, if such imperfections can be removed before the time for completing the purchase:" Chitty on Contracts, 6th edit. 279. Assuming, therefore, that the plaintiff was unable at the time to obtain the consent of Lord Salisbury to the defendant's becoming tenant of the farm, that would not disentitle the plaintiff to recover the 500*l.* If, \*when [\*757 the day arrived for giving the defendant possession, the plaintiff was unable to procure the consent of Lord Salisbury, the defendant might be entitled to recover back the money: but, until that day, the disapproval, which might at any time be recalled, would be no answer to the plaintiff's claim. The fifth plea, therefore, is clearly bad. The sixth plea is also bad. It is not alleged that the disapproval of Lord Salisbury was intimated before the lapse of a reasonable time for the defendant to get a remittance from Berwick. This plea professes to be

(a) The points marked for argument on the part of the plaintiff were as follows:—

*Upon the demurrers to the pleas.*—"1. That the fifth and sixth pleas confess a breach, but contain no avoidance of it; that the obtaining of Lord Salisbury's consent was not a condition precedent to the plaintiff's being entitled to recover it, and he was by the agreement entitled to receive the 500*l.* down instantly, and the fresh agreement was founded upon a perfectly distinct consideration, viz., that he would dispense with the present payment, and take the defendant's I. O. U.; that this agreement was a perfectly distinct and separate agreement from the first, and the plaintiff is entitled to recover for a breach of it; that, even if the facts stated would have afforded an answer to the original, it affords no answer to the second contract, by which the plaintiff gave up his rights under that; that, even if the claim rested upon the original agreement, the plea affords no answer, as the obtaining of Lord Salisbury's consent was to be a matter subsequent, and the plaintiff then was entitled to have the money down and the use of it until it was finally ascertained that Lord Salisbury would not accept the defendant; that the disapproval of Lord Salisbury alleged affords no answer, as it does not show, that, before the expiration of the stipulated period, Lord Salisbury had not withdrawn it, and approved him, or might have done so; that a Court of equity would not in such a case as that stated in the sixth plea award a perpetual injunction; and that the defendant was at all events bound to show under what circumstances the alleged disapproval had been expressed, and that it was continuing, and that the defendant was in no way in default."

*Upon the demurrer to the replication.*—"That the Court of equity would never issue a perpetual injunction to restrain the plaintiff under the circumstances stated from proceeding to recover the 500*l.*, at all events unconditionally, and deprive him of a remedy for any loss the defendant's own misconduct may have entailed; that the principle *volenti non fit injuria* applies, and the defendant cannot avail himself of his own act to avoid the contract; and that the plea to which it is pleaded is bad in substance."

pleaded as a defence on equitable grounds. It, however, discloses no equity. A Court of equity will not grant an injunction to restrain a vendor from suing for a deposit: that is treated as a purely legal matter. Nor is circuity of action any answer: the measure of damages would be different.

\*758] *C. Wood*, for the defendant. (a)—The declaration \*discloses no consideration for the alleged promise of the defendant: nor does it even show any *mutual* agreement: the defendant is said to have agreed to one thing, the plaintiff to another. In *Chitty on Contracts*, pp. 9, 10, it is said, that, “In order that a simple contract may be binding, there must first be a definite promise by the party charged, accepted by the person claiming the benefit of such promise. Accordingly, no contract is raised by a mere *ex parte* affirmation in discourse, or by a mere overture or offer to enter into an agreement, not definitively and expressly assented to by both parties.” And the author refers to *Jackson v. Galloway*, 6 Scott 786, 792, for the following passage in the judgment of Tindal, C. J.,—“A contract,” says Pothier (1 Pothier on Oblig. part 1, c. 1, § 1, art. 2), “includes a concurrence of intention in two parties, one of whom promises something to the other, who on his part accepts such promise. A *pollicitation* is a promise not yet accepted by the person to whom it is made. *Pollicitatio est solius offerentis promissum*. A *pollicitation*, according to the rules of mere natural law, does not produce what can be properly called an obligation; and the person who has made the promise may *retract* it at any time before it is accepted; for, there cannot be any obligation without a right being acquired by the person in whose favour it is contracted, against the party bound. Now, as I cannot by the mere act of my own mind \*759] transfer to another a \*right in my goods without a concurrent intention on his part to accept them, neither can I by my promise confer a right against my person, until the person to whom the promise is made has, by his *acceptance* of it, concurred in the intention of acquiring such right.” In *Cooke v. Oxley*, 3 T. R. 653, the declaration stated that the defendant had proposed to sell and deliver to the plaintiff goods upon certain terms, if the plaintiff would agree to purchase them upon those terms, and would give the defendant notice thereof before four o’clock on that day: averment, that the plaintiff did agree,

(a) The points marked for argument on the part of the defendant were as follows:—

“1. That the second plea to the second count is a good answer thereto:

“2. That, in the third plea to the second count, it was not necessary to show how Lord Salisbury’s disapproval arose, but that it was sufficient to state that Lord Salisbury disapproved before the 500*l.* was demanded, or the action brought:

“3. That the third plea to the second count is a good answer thereto, inasmuch as, if, after the disapproval by Lord Salisbury the defendant had paid the said deposit of 500*l.* to the plaintiff, he would immediately on such payment be entitled to recover it back:

“4. That the replication to the third plea is bad, as being a departure from the declaration, and also on the ground that the withdrawal by the defendant of his application was no sufficient reason for Lord Salisbury disapproving of him as a tenant, nor does it amount to a procuring Lord Salisbury to disapprove of him as a tenant; and that the replication does not show that there was such a non-completion of the said agreement by the defendant as would enure to the forfeiture of the 500*l.* within the meaning of the said agreement:

“5. That, if at any time before the deposit of the 500*l.* was paid to the plaintiff, Lord Salisbury disapproved of the defendant as a tenant, this action is not maintainable, on the principle of avoiding circuity of action:

“6. That the declaration is bad in substance, as not disclosing a sufficient consideration for the promise.”

and gave the required notice, but defendant, on request, did not deliver. After verdict the judgment was arrested; and, a writ of error having been brought, that decision was affirmed, on the ground that it appeared by the record that there was only a proposal of sale by one party, and no allegation that the other party had acceded to the contract of sale.<sup>(a)</sup> [ERLE, C. J.—The agreement here must be in writing.] Still there is no consideration for the second promise. The consideration alleged is, that the plaintiff would dispense with the payment down of the 500*l.*, and take the defendant's I. O. U. Now, there could be no dispensation after breach. [ERLE, C. J.—It was a contemporaneous act.] The fifth plea, at all events, affords a good answer. It states, that, before the defendant could procure his banker to remit the money, and before any demand of payment of the I. O. U., the defendant was disapproved of as a tenant by Lord Salisbury. Then, the sixth plea states, that, before the commencement of the action, and before any demand of payment of the I. O. U., the defendant was disapproved of as a tenant by Lord Salisbury, and the \*plaintiff was thereby rendered unable to sell [\*760 and transfer the lease to him. Both these are perfectly good pleas. If the vendor of a lease, in which there is a covenant not to assign without the lessor's consent, contract to assign his interest, it is incumbent on him, and not on the purchaser, to procure the lessor's license for the assignment: *Lloyd v. Crispe*, 5 Taunt. 249 (E. C. L. R. vol. 1); *Mason v. Corder*, 7 Taunt. 9 (E. C. L. R. vol. 2); 2 Marsh. 303 (E. C. L. R. vol. 4). The replication to the sixth plea is bad, on the ground of departure: it imports an entirely new agreement. [WILLIAMS, J.—It is pleaded as an equitable answer to your equitable plea; its object being to show that you do not come into Court with clean hands.] There could be no necessity for any application being made to Lord Salisbury for his consent, unless there was a covenant against alienation without consent; and, if so, it was the plaintiff's duty to obtain Lord Salisbury's consent, and he should have shown that he had done something towards procuring it. The period mentioned for the completion of the agreement had not arrived when the action was brought. The defendant might in the interim have withdrawn his refusal.

*Dowdeswell* was heard in reply.

ERLE, C. J.—The plaintiff by his declaration claims a sum of 500*l.* The original contract between the parties was, that the plaintiff should sell and transfer to the defendant a farm, &c., for 500*l.* down, the implements, stock, &c., to be taken at a valuation,—subject to the defendant's being approved of as a tenant by Lord Salisbury; the purchase to be completed and the amount of the valuation paid by the 22d of January, 1861. But this action is brought upon a substituted contract, under which the plaintiff agreed to dispense \*with the payment [\*761 down of the 500*l.*, and to take the defendant's I. O. U. for that sum, the defendant promising to pay the plaintiff the 500*l.* as soon as he could write to his banker at Berwick, and procure him to remit the same. The whole contract on both sides was subject to the approval of Lord Salisbury. Now, the fifth plea states that before the defendant

(a) See observations on this case per Bayley, J., in *Humphries v. Carvalho*, 16 East 45, 48, and per Best, C. J., in *Routledge v. Grant*, 4 Bingh. 653, 660 (E. C. L. R. vol. 19), 1 M. & P. 717.

could procure his said banker to remit as alleged, and before any demand of payment of the I. O. U. by the plaintiff, the defendant was disapproved of as a tenant by Lord Salisbury. If the whole contract was subject to the approval of the defendant by Lord Salisbury as a tenant, and before the arrival of the time at which by the substituted agreement the money was to be paid Lord Salisbury's disapproval had intervened, I think that disapproval is a bar to the plaintiff's claim for the 500*l*. It appears to me that the fifth plea is a good plea, if capable of being proved. The words of the plea must be read in the same sense as that in which they are used in the declaration. The defendant further pleads, on equitable grounds, that, before the commencement of the action, and before any demand by the plaintiff of payment of the I. O. U., the defendant was disapproved of as a tenant by Lord Salisbury, and the plaintiff was thereby rendered unable to sell and transfer the said lease to the defendant. I do not think that is a good equitable plea. It discloses no grounds upon which the defendant would be entitled to an injunction in a Court of equity, because it confesses that there had been a breach of contract by the defendant before the disapproval of Lord Salisbury intervened. Assuming, however, that it may be a good plea, there is a replication which states that it was arranged and agreed between the plaintiff and the defendant, that, in order and for the purpose \*762] of obtaining the defendant's being approved as a tenant by Lord Salisbury, he the defendant should apply to and request of Lord Salisbury to accept him as such tenant, and that thereupon, and before any disapproval of Lord Salisbury as in the sixth plea mentioned, the defendant applied to Lord Salisbury to accept him as such tenant, and that afterwards, and before any such disapproval as in that plea mentioned, the defendant withdrew such application, and declined to Lord Salisbury to be accepted as such tenant, and by his own act, and without any default or act of the plaintiff, procured Lord Salisbury to disapprove of him as such tenant, &c. The substance of that is, that the disapproval of Lord Salisbury was procured by the act of the defendant, in order to afford him a pretext for breaking his contract. I think that is a good replication. I think there can be no doubt, that, if the defendant had gone to a Court of equity, and it had been shown that the failure to procure the approval of Lord Salisbury to his becoming the tenant had arisen from his own act, he would not have succeeded in obtaining relief. The result is, that the defendant is entitled to judgment on the fifth plea, and the plaintiff to judgment on the demurrers to the sixth plea and to the replication thereto.

WILLIAMS, J.—I am entirely of the same opinion: and I will only add, that, as to the words in the fifth plea "before the defendant could procure his said banker to remit as alleged," without intending to express any dissent from what has fallen from my Lord, I do not think we are called upon to give any opinion as to what is the real period described by those words. Possibly it may hereafter become necessary for the Court to express an opinion; but I think we ought not to do so now. It is enough to say that the same construction must be given to \*763] the words of the plea as is given to the same words in the declaration. All that the plea means, is, that the period for payment of the money in the plea and in the substituted agreement was the same, and that, before that period arrived, the disapproval of the defend-

ant as a tenant by Lord Salisbury had been expressed. I think that is a good answer. The sixth plea is clearly bad: it affords no equitable answer to the demand in the second count: and, as to the replication, for the reasons given by my Lord, I think it in substance affords an answer to the sixth plea. It may be that, under the circumstances, the plaintiff's claim must be limited to such damages as could properly be awarded to him for being deprived of the use of the money from the time at which it ought according to the agreement to have been paid until the time when he could be compelled to return it.

WILLES, J.—I am of the same opinion. Mr. *Dowdeswell's* most plausible argument on the fifth plea, is, that the disapproval of Lord Salisbury was immaterial before the day named for the completion of the contract. But it strikes me that the true construction of the agreement is, not that the parties are to go on from day to day doing nothing until the 22d of January, but that application was to be made to Lord Salisbury for his approval within a reasonable time, and that, whether the contract was to be carried into effect or not, was to depend upon the issue of that application. If the approval of Lord Salisbury was not obtained, then the contract was to be off. That being so, when that had occurred which was to put an end to the contract, the plaintiff would have been bound to return the 500*l.* if it had been paid in pursuance of the original agreement. He has entered into a bargain to postpone the lodging of the money until \*after a certain day, before the arrival [\*764 of which the disapproval of Lord Salisbury was expressed. The sixth plea raises an extremely nice point. The legislature, in enabling Courts of common law to allow equitable pleas to be pleaded, has only enabled them to do so where a Court of equity would restrain the plaintiff from suing absolutely and unconditionally. Testing it by that, this plea shows a state of things in which the defendant has made default, and in which, if the defendant had not made such default, the plaintiff might have used and made a profit of the 500*l.* for a given time. I am not disposed to think that is a case in which a Court of equity would interfere to the extent required to satisfy the rule which has been laid down upon the subject of equitable pleas. As to the replication, I agree with my Lord that it is a good answer.

BYLES, J.—I agree with the rest of the Court. As to the construction of the fifth plea, I also consider with my Brother Williams that that will recur to us upon the trial of the issues. At present, it is enough to say, that, whatever be the construction of the words in the declaration, the same construction must be given to the same words in the plea. One cannot help seeing the probability that the facts will show, that, so soon as the 500*l.* became payable, the plaintiff became liable to refund it; and therefore in reality this is a mere struggle for nominal damages. Judgment accordingly.

**\*765] \*WHITEHOUSE v. FELLOWES. Feb. 12.**

Where a statute limits the period within which an action is to be brought for an act done or committed, if the cause of action be a single act, or one which amounts to a trespass (except it be a continuing trespass), the action must be brought within the prescribed period after the actual doing of the thing complained of: but, if the cause of action be, not the doing of the thing, but the resulting of damage only, the period of limitation is to be computed from the time when the plaintiff sustained the injury.

By the General Turnpike Act, 3 G. 4, c. 126, s. 147, all actions against trustees of any turnpike-road for anything done in pursuance of the Act must be commenced within three months after *the fact committed*. The trustees of a turnpike-road, acting *bonâ fide* in execution of the powers conferred upon them by their Act, converted an open ditch at the side of the road into a covered drain, placing gratings at intervals, with catch-pits, to carry off the water from the surface of the road into the drain: but, in consequence (as the jury found) of the negligent way in which the catch-pits were constructed *and kept*, the drain was in times of heavy rain insufficient to carry off the water in its accustomed channel, and it was consequently diverted to the plaintiff's land, and drowned his colliery:—

Held, that an action brought within three months after the damage sustained from this continuing nuisance was brought in time; that the trustees were liable; and that it was no misdirection on the part of the Judge to abstain from telling the jury that the defendants, as trustees acting gratuitously for the benefit of the public, were not responsible if they acted with reasonable skill and care and to the best of their judgment.

THIS was an action against the defendant as clerk to the trustees of the Sedgeley Road, in the county of Stafford, for alleged negligence in reference to works executed by them under the authority of their Act.

The declaration stated that the trustees so negligently, carelessly, wrongfully, and improperly conducted themselves in and about improving, maintaining, and keeping in repair a certain turnpike-road leading from Cann Lane to the town of Bilston, in the county of Stafford, to wit, by making and keeping manifestly insufficient catch-pits for carrying off the water accumulating and running in and along the said road, and by improperly cutting divers outlets from the said road into the adjoining land, that, by means of such negligent, careless, wrongful, and improper conduct, large quantities of water ran from such road into the land and collieries of the plaintiff, whereby the said land and collieries had been and were damaged, and the plaintiff had been and was prevented from working the said collieries, and lost large gains and profits which he would otherwise have made, and had been put to great expense in and about pumping the water out of the said collieries, and putting the same  
\*766] again into working \*order, and thereby large quantities of mining tools, apparatus, and stock had been injured, destroyed, and lost to the plaintiff.

The defendants pleaded not guilty by statute,—3 G. 4, c. 126, s. 147.

The cause was tried before Byles, J., at the Stafford Summer Assizes, 1860, when the following facts appeared in evidence:—The plaintiff was the owner of a colliery called the Prior Fields colliery, near which, and inclining towards it, was a steep road under the management of the Sedgeley Road trustees, called Cann Lane Road. Formerly there was an open ditch at the side of this road, by which the water in times of heavy rain was carried off to a canal, without doing any damage to the adjoining property. A few years ago, however, the trustees converted this open ditch into a covered drain or culvert, with gratings placed at

intervals to carry the water into it from the road, with catch-pits to prevent the drain from being silted up. But, in consequence, as was stated by the plaintiff's witnesses, of the insufficiency of these catch-pits, or their being kept in an improper state, the covered drain failed at times to carry off all the surface water in the direction in which it had passed by the old ditch: and the result was that large quantities of rain water which otherwise would have flowed harmlessly away, flooded the road at the bottom and also the adjoining land belonging to one Pemberton, and from thence percolated through the plaintiff's land and into his colliery, and did considerable mischief.

The plaintiff had originally complained of the nuisance to the trustees in July, 1859, when some attempt was made by them to abate it. But, in the months of November and December in that year, the plaintiff's colliery was so flooded as wholly to prevent his working it.

\*This action was commenced on the 19th of January, 1860. [\*767

On the part of the defendants, it was objected that the action should have been brought within three months after the works were done which occasioned the damage, pursuant to the 147th section of the General Turnpike Act, 3 G. 4, c. 126, which provides that actions against trustees shall be commenced or prosecuted within three months after the fact committed and not afterwards,—or, at all events, from the time the first injury resulted. It was further contended, that the trustees, being a public body, acting according to the best of their judgment in the execution of their duties under the Act of Parliament, and receiving no personal emolument, were not responsible.

For the plaintiff it was insisted that the period of limitation ran from the time the damage was sustained, and not from the time of the doing of the work; and that there was no distinction in this respect between the case of public trustees and that of an individual.

The learned Judge left it to the jury to say whether the defendants had been guilty of negligence in doing what they did. The jury found for the plaintiff, with nominal damages,—leave being reserved to the defendants to move to enter a nonsuit, if the Court should think the action was not maintainable, or not brought in time.

*Pigott*, Serjt., in Michaelmas Term last, obtained a rule nisi to enter a nonsuit, on the ground that the action was brought too late, being brought more than three calendar months after the fact committed, within the meaning of the 147th section of the 3 G. 4, c. 126; or for a new trial on the ground that the Judge \*misdirected the jury, in [\*768 not leaving to them the question whether the defendants had been guilty of negligence, or want of due care in keeping the catch-pits mentioned in the declaration of an insufficient size or improper state for carrying off the water, and in stating to the jury that they were to consider the case as if it were one of a private individual suing another, and that the Judge should have left it to the jury to say whether the defendants as trustees acting gratuitously for the public benefit had acted with reasonable skill and care to the best of their judgment; or on the ground that the verdict was against the evidence. The following cases were referred to,—*Jones v. Bird*, 5 B. & Ald. 887 (E. C. L. R. vol. 7), *Sutton v. Clarke*, 6 Taunt. 29 (E. C. L. R. vol. 1), *Wordsworth v. Harley*, 1 B. & Ad. 391 (E. C. L. R. vol. 20), *Oakley v. The Kensington Canal Company*, 5 B. & Ad. 138 (E. C. L. R. vol. 27), *The Grocers'*

*Company v. Donne*, 3 N. C. 34 (E. C. L. R. vol. 82), 3 Scott 356, *Violett v. Sympton*, 8 Ellis & B. 344 (E. C. L. R. vol. 92), *Ruck v. Williams*, 3 Hurlst. & N. 308,† *Bonomi v. Backhouse*, Ellis, B. & E. 622 (E. C. L. R. vol. 96).

*Gray and Holl* showed cause.—The action, which was brought within three months after the damage accrued to the plaintiff from the negligence of the defendants, was commenced in time. The 147th section of the 3 G. 4, c. 126, requires the action to be commenced or prosecuted within three months after the fact committed. Now, “the fact committed” which gives the plaintiff a cause of action, is, the keeping the catch-pits in an insufficient state; for, there is no doubt that an act of nonfeasance is within the contemplation of the Act. The plaintiff could not on the first formation of these works sue for prospective damage; nor was he bound to sue upon the happening of the first slight injury he sustained: he was fully justified in waiting until real and substantial damage \*769] occurred. This is not like *Bonomi v. Backhouse*, Ellis, B. & E. 622 (E. C. L. R. vol. 96), and that class of cases, where the whole injury complained of flows from one act done. The cause of action here is, the omission of the trustees to have these catch-pits in a proper and efficient state at the time a flood comes. Suppose the plaintiff, having sustained slight damage, had brought his action and recovered 20s., and three months afterwards, from the continuance of the catch-pits in the same improper condition, he sustained further damage to the extent of 1000l., would the recovery in the first action be any answer to the second? Clearly not. *Roberts v. Read*, 16 East 215, is very like this case. It was there held, that, though the General Highway Act, 13 G. 3, c. 78, s. 81, directed that actions against any persons for anything *done* or *acted* in pursuance thereof, should be commenced within three calendar months after the fact committed, and not afterwards; yet, if surveyors of highways, in the execution of their office, undermined a wall adjoining to the highway, which did not fall till more than three months afterwards, they were responsible for the consequential injury within three months after the falling of the wall. In the course of the argument, Bayley, J., asks, “How was the damage to be estimated before it actually happened?” The same question may be asked here. And, in giving judgment, Lord Ellenborough says: “It is sufficient that the action was brought within three months after the wall fell, for, that is the gravamen: the consequential damage is the cause of action in this case. If this had been trespass, the action must have been brought within three months after the act of trespass complained of: but, being an action on the case for consequential damage, it could not have been brought till the specific wrong had been suffered.” The London Dock Act, 39 & 40 G. 3, c. 47, s. 151, enacts that no action shall be com- \*770] menced against any person for anything done in pursuance of that Act after six calendar months next after the fact committed: the London Dock Company had two years before the commencement of an action undermined the wall of a wharf in one undivided third part of which the plaintiff’s father then had a life interest, with remainder to his son in fee: in consequence of this undermining, the wall fell, *but after the plaintiff’s title accrued*: and it was held that the son might maintain the action, although the wall was undermined during the lifetime of the father; and that the action was brought in time, if brought within six

months after the falling of the wall: *Gillon v. Boddington*, R. & M. 161 (E. C. L. R. vol. 21), 1 Car. & P. 541 (E. C. L. R. vol. 12). In *Howell v. Young*, 5 B. & C. 259, 268 (E. C. L. R. vol. 11), 8 D. & R. 14 (E. C. L. R. vol. 16), Holroyd, J., says: "What is said by Holt, C. J., in *Fetter v. Beale*, 11 Salk. 1 (1 Lord Raym. 339), explains the principle of the decision in *Gillon v. Boddington*: there, although the excavation was made in the life of the father, it was continued after his death, and after the title of the remainder-man had accrued. The continuance of the excavation was a continuing nuisance, and constituted a new cause of action." That precisely meets the present case: the making of the catch-pits was no cause of action per se; the cause of action is, the neglecting to keep them in a proper and efficient state, whereby damage resulted to the plaintiff. In *Bonomi v. Backhouse*, Ellis, B. & E. 622 (E. C. L. R. vol. 96), the act of which the plaintiff complained was one single act of commission: there was no continuing duty or continuing negligence. [BYLES, J.—Like a breach of a covenant to repair. WILLIAMS, J.—In *Holmes v. Wilson*, 10 Ad. & E. 503 (E. C. L. R. vol. 37), the trustees of a turnpike-road built buttresses to support it on the land of A., and A. thereupon sued them and their workmen in trespass for such erection, and accepted money paid into Court in full satisfaction of the \*trespass: and it was held, that, after notice to the defendants [\*771 to remove the buttresses, and a refusal to do so, A. might bring another action of trespass against them for keeping and continuing the buttresses on the land, to which the former recovery was no bar. That was considered a strong decision. It was followed, however, by the Court of Exchequer in *Thompson v. Gibson*, 7 M. & W. 456.† WILLES, J.—On the ground that it was a continuing trespass. WILLIAMS, J.—The cases on this subject are considered in *Battishill v. Reed*, 18 C. B. 696 (E. C. L. R. vol. 86), where Jervis, C. J., in the course of the argument, says,—“The rule suggested in *Holmes v. Wilson* and *Thompson v. Gibson* is adopted by Professor Sedgwick,—see *Sedgwick on Damages*, 2d edit. p. 144, where it is said,—‘Every continuance of a nuisance is held to be a fresh one, and therefore a fresh action will lie.’(a) And, says Blackstone (3 Bl. Com. ch. 13), speaking of the same subject, very exemplary damages will probably be given, if, after one verdict against him, the defendant has the hardiness to continue it. On this ground, that suit can be brought toties quoties, it has been decided, that, in an action on the case for a nuisance, damages sustained subsequent to the bringing of the action are not recoverable.”(b) You must contend here as the fresh nuisance was a fact committed.] That would not be so long a stride towards common sense as was taken by Lord Ellenborough in *Roberts v. Read*. The distinction which pervades the cases is this,—Where the plaintiff complains of a trespass, the statute runs from [\*772 \*the time when the act of trespass was committed, except in the case of a continuing trespass. But, where the cause of action is not in itself a trespass, as, an act done upon a man's own land, and the cause of action is the consequential injury to the plaintiff, there the period of limitation runs from the time the damage is sustained: see Mayne on

(a) 3 Bl. Com. 220; *Vedder v. Vedder*, 3 Denio (American) 257; *Delaware and Raritan Canal Company v. Wright*, 1 Zabiskie (American) 469.

(b) *Duncan v. Markley*, 1 Harper (American) 276; *Blount v. M'Cormick*, 3 Denio (American) 233; *Thayer v. Brooks*, 17 Ohio (American) 439.

Damages, p. 36. In *Lloyd v. Wigney*, 6 Bingh. 489, 4 M. & P. 222, by the Brighton Improvement Act, 6 G. 4, c. clxxix., s. 255, actions for any injury done by the commissioners under the Act were to be brought within six months after *the thing done*: the defendants, proceeding under that Act to dig a sewer, cracked the walls of the plaintiff's house; and it was held that the plaintiff's right of action was limited to six months after the day on which the crack was occasioned. None of the cases cited on moving for the rule have any very close application. *Oakley v. The Kensington Canal Company*, 5 B. & Ad. 138 (E. C. L. R. vol. 27), was an action for an injury to the reversion, where the injury was complete and the cause of action accrued the moment the thing complained of was done: it was not a case of continuing trespass. So, in *Wordsworth v. Harley*, 1 B. & Ad. 391 (E. C. L. R. vol. 20), all that was actionable was complete at the first moment. Again, in *Violett v. Symson*, 8 Ellis & B. 344 (E. C. L. R. vol. 92), the damage arose from the act of opposing the insolvent's discharge: the imprisonment was the act of the Court. It is difficult to see upon what ground the objection to the summing up is based. The learned Judge in substance left it to the jury to say whether or not the defendants had been guilty of negligence in keeping the catch-pits in an insufficient or improper state. It is said that he ought to have told them that the acts of a body of trustees acting gratuitously for the public benefit are not to be judged by the same standard that is applied to those of \*private individuals.

\*773] It is true that in some of the older cases it was considered hard to make a man personally responsible where he acts gratuitously in this way: but the modern authorities seem to consider that hardship obviated by the provision which enables these bodies to sue and be sued in the names of their clerks. *The Grocers' Company v. Donne*, 3 N. C. 34 (E. C. L. R. vol. 32), 3 Scott 356, is an authority to show that commissioners, though acting in the bonâ fide performance of a public duty, are responsible for an injury to an individual resulting from an act so done by them, if they have been guilty of negligence or want of skill in the conduct of it. In *Jones v. Bird*, 5 B. & Ald. 837, 845 (E. C. L. R. vol. 7), Bayley, J., says: "It is said that the defendants [commissioners of sewers] are protected if they acted bonâ fide and to the best of their skill and judgment. But that is not enough: they are bound to conduct themselves in a skilful manner; and the question was most properly left to the jury to say whether the defendants had done all that any skilful person could reasonably be required to do in such a case." In *Ruck v. Williams*, 3 Hurlst. & N. 308,† the plaintiff was the owner of premises at Cheltenham which were drained by a sewer which emptied itself into the river Chelt: at the mouth of this sewer, there was a flap or penstock which prevented any water of the river from flowing up the sewer: in the year 1852, an Act of Parliament passed for improving the town of Cheltenham (15 Vict. c. 1), which directed the commissioners appointed under it to make new sewers: accordingly, the commissioners constructed a new sewer, which passed under the river Chelt near the plaintiff's premises, and removed the flap from the mouth of the old sewer, and connected it with the new sewer: the plaintiff's premises were twelve feet below the summit level of the new sewer: in July, 1855, there was

\*774] a \*heavy storm of rain, by which the river Chelt was flooded, and in consequence the new sewer burst, and the water of the

river flowed into it: the commissioners erected a stank round the hole, but before the repair of the sewer was completed another extraordinary flood took place, by which the stank was washed away, and the water of the river rushed into the sewer, and forced the sewage water and matter into the plaintiff's premises, thereby causing great damage: the 15 Vict. c. 1, incorporates the 144th section of the Public Health Act, 1848 (11 & 12 Vict. c. 63), which provides, "that full compensation shall be made out of the general or special district-rates to be levied under this Act to all persons sustaining any damage by reason of the exercise of any of the powers of this Act:" it was held that the commissioners were liable to an action for negligence, and were entitled to reimburse themselves out of the rates. Martin, B., founds his judgment mainly upon the case of *The Itchin Bridge Company v. The Local Board of Health of Southampton*, 27 Law J., Q. B. 128, which he says, "shows that the commissioners were liable to an action for damages." *Ward v. Lee*, 7 Ellis & B. 428 (E. C. L. R. vol. 90), is an authority to the same effect. It is no answer to say that there may be a difficulty in enforcing the judgment, when obtained: *Kendall v. King*, 17 C. B. 483 (E. C. L. R. vol. 84). In the *Grocers' Company v. Donne*, 3 N. C. 34 (E. C. L. R. vol. 32), 3 Scott 356 (E. C. L. R. vol. 36), Parke, J., says: "The defendants being public commissioners, it should have been shown that they were guilty of negligence in order to warrant a finding against them." Here, the question of negligence was left to the jury, and they found that the defendants had been guilty of negligence,—a finding with which the learned Judge has not reported himself dissatisfied. In *Sutton v. Clarke*, 6 Taunt. 34 (E. C. L. R. vol. 1), 1 Marsh 429 (E. C. L. R. vol. 4), and *Boulton v. Crowther*, 2 B. & C. 703 (E. C. L. R. vol. 9), 4 D. & R. 195 (E. C. L. R. vol. 16), there was no negligence.

\**Pigott*, Serjt., and *Phipson*, in support of the rule.—The impression which was evidently conveyed to the minds of the jury by [\*775 the summing up, was, that, if in the performance of their duty the trustees of this road created a head of water, they were bound to get rid of it so as to avoid damage to the proprietors below. [KEATING, J.—If the head of water was suffered to accumulate through the negligence of the trustees, would they not be liable?] Possibly they might. [WILLIAMS, J.—Are you prepared to contend, that, if trustees can do their duty effectually without throwing the accumulation of water upon the adjoining land, they are not to be held responsible for their negligence?] It is not necessary to go so far: it is enough to say that one who, in the exercise of a public function, without emolument, which he is compellable to execute, acting *bonâ fide* and according to the best of his skill, and upon the best information he can obtain, does an act which occasions damage to a subject, is not liable to an action for it: *Sutton v. Clarke*, 6 Taunt. 34 (E. C. L. R. vol. 1), 1 Marsh. 429 (E. C. L. R. vol. 4). Gibbs, C. J., in delivering the judgment of the Court, there says: "This case is perfectly unlike that of an individual, who, for his own benefit, makes an improvement on his own land according to his best skill and diligence, not foreseeing it will produce any injury to his neighbour: if he thereby unwittingly injure his neighbour, he is answerable. The resemblance fails in the most important point of comparison, that his act is not done for a public purpose, but for private emolument. Here, the defendant is not a volunteer: he executes a duty imposed on him by the legislature,

which he is bound to execute. He exercises his best skill, diligence, and caution in the execution of it; and we are of opinion that he is not liable for an injury which he not only did not foresee, but could not \*776] \*foresee. He has done all that was incumbent on him, having used his best skill and diligence." [WILLIAMS, J.—There, the commissioners were authorized by the Act of Parliament to do the very thing they did: here, the only duty imposed upon the trustees was, to keep the road in repair.] It does not necessarily follow that the trustees were guilty of negligence because injury has resulted to the plaintiff from what they have done. The true test of their liability is, whether they have conducted themselves with reasonable care, diligence, and skill: and that was never presented to the jury. In substance, they were told that the trustees were bound at all events to prevent the water from flowing into the plaintiff's colliery. In *Harris v. Baker*, 4 M. & Selw. 27, the trustees of a public road who were empowered and required by Act of Parliament to place lamps along the road, if they should think necessary, and to make contracts for the cleansing of the road, and to take a night toll for the purpose of enabling them to light and watch the same,—were held not liable in an action upon the case for an injury suffered by an individual in crossing the road at night, by falling over a heap of scrapings left on the road side after cleansing the road, without any lights. So, in *Metcalf v. Hetherington*, 11 Exch. 257,† harbour trustees, acting gratuitously, and to the best of their judgment, were held not responsible for damage to a vessel which they had directed to be moored in an improper place, or for an injury occasioned to the vessel by an accumulation of mud in the harbour. In giving judgment, Parke, B., says: "Can the discretionary power which is confided to them (the commissioners) as trust worthy persons by Parliament, be subject to the control of the opinion of a common jury, who may overrule their decisions in an action against them, if they think they have acted with wrong \*777] \*judgment, and render them liable to pay costs? We think such a proposition is perfectly untenable." [WILLES, J.—*Metcalf v. Hetherington* received a fatal blow in *Gibbs v. The Trustees of the Liverpool Docks*, 3 Hurlst. & N. 164.†] Negligence is a relative term, as was observed by Bramwell, B., in *Degg v. The Midland Railway Company*, 1 Hurlst. & N. 773, 781,† and *Ruck v. Williams*, 3 Hurlst. & N. 308, 318.† Then, this action should have been commenced within three months after the fact committed. The "fact committed" means the "cause of action;" and the cause of action was, the making of insufficient catch-pits. This is the first time since *Sutton v. Clarke* that this question has been directly raised. Does a new cause of action arise from simply continuing the catch-pits? The true distinction is that taken by Parke, B., in *Nicklin v. Williams*, 10 Exch. 259, 268,† viz. whether the action is brought for an injury to a right, or for consequential damage. [WILLES, J.—*Sutton v. Clarke* is open to the observation that the point decided by the Court is not the point which was taken at *Nisi Prius*: see the report in Marshall.] The present case is in some respects like *Bonomi v. Backhouse*, Ellis, B. & E. 622 (E. C. L. R. vol. 96). In both, the act was lawful at the time it was done; but it occasioned damage to a third person some time afterwards. The Exchequer Chamber in that case, reversing the judgment of the majority of the Court of Queen's Bench, held, that no cause of action accrued from the

mere excavation by the defendant in his own land, so long as it caused no damage to the plaintiff; and that the cause of action did accrue when the actual damage first occurred; and, consequently, that the Statute of Limitations ran from the time of the damage only.<sup>(a)</sup> But, [\*778] "suppose a second slip occurred, nothing having been done in the mean time,—would that constitute a new cause of action? [WILLIAMS, J.—What do you say is the cause of action here?] The negligent construction of the catch-pits and the first damage arising therefrom. [WILLIAMS, J.—In that case the plaintiff would have no remedy for recurring damage.] Nor ought he: he would be entitled in the first action to recover a compensation for the probable damage that would result to him from the wrongful act complained of. [KEATING, J.—The jury would be told that the nuisance might be abated the next day.] This is not like a continuing trespass, as in *Holmes v. Wilson*, 10 Ad. & E. 503 (E. C. L. R. vol. 37), and *Battishill v. Reed*, 18 C. B. 696 (E. C. L. R. vol. 86). *Nicklin v. Williams*, 10 Exch. 259,† may be considered as overruled by the Exchequer Chamber in *Bonomi v. Backhouse*. No case is to be found where a man has been held liable to a second action for consequential damage arising from the continuance upon his own land of that which was per se a lawful act. In *Clegg v. Dearden*, 12 Q. B. 576 (E. C. L. R. vol. 64), the owner of a coal-mine excavated as far as the boundary (which he was by custom entitled to do), and continued the excavation wrongfully into the neighbouring mine, leaving an aperture in the coal of that mine, through which water passed into it and did damage: and it was held that the party excavating was liable in trespass for breaking into the neighbouring mine, but not in an action on the case for omitting to close up the aperture on his neighbour's soil, though a continual damage resulted from its being unclosed.<sup>(b)</sup>

\*WILLIAMS, J.—This rule was obtained upon three distinct grounds, two of which are based on questions of law, the third [\*779] being whether the verdict was contrary to the weight of evidence. The points of law are,—first, whether the action is answered by reliance on the 147th section of the General Turnpike Act, 3 G. 4, c. 126, the limitation clause, which enacts, that, "if any action shall be commenced against any person or persons for anything done in pursuance of this Act, then and in every such case such action or suit shall be commenced or prosecuted within three months after the fact committed, and not afterwards:" and it is said that the fact committed is outside the limitation, and therefore the action is barred. The second point of law is, that the learned Judge misdirected the jury, in not properly leaving to them the question whether the defendants, the trustees, were guilty of such a degree of negligence as would render them liable in this action.

I think it will be more convenient to address myself in the first instance to the second ground. It is said that there is a great differ-

(a) The judgment of the Exchequer Chamber affirmed by the House of Lords; see *Backhouse v. Bonomi*, 7 Jurist, N. S. 809.

(b) Lord Denman, in giving judgment in that case, says: "The defendant having made an excavation and aperture in the plaintiff's land, was liable to an action of trespass; but no cause of action arises from his having omitted to re-enter the plaintiff's land and fill up the excavation: such an omission is neither a continuation of a trespass nor of a nuisance; nor is it the breach of any legal duty."

ence between trustees and private individuals, in respect of acts done in the discharge of a gratuitous public duty; and many cases have been referred to for the purpose of sustaining that proposition. As to several of those cases, I must confess they do not appear to me to have any application to the matter in hand. The class of cases to which I allude is that of which *Sutton v. Clarke*, 6 Taunt. 29 (E. C. L. R. vol. 1), is the one most relied on: but I apprehend that that case and others of the same class only bear upon acts of trustees and the consequences of those acts, where the trustees are authorized and required to do a \*specific and particular thing. The cases of *The Governor and \*780] Company of the British Cast Plate Manufacturers v. Meredith*, 4 T. R. 794, *Sutton v. Clarke*, 6 Taunt. 29, and *Boulton v. Crowther*, 2 B. & C. 703 (E. C. L. R. vol. 9), 4 D. & R. 195 (E. C. L. R. vol. 16), appear to me to warrant this doctrine and no other, that, where trustees of a turnpike-road, or other similar official persons, are authorized to do a particular act, such as raising a road, lowering a hill, or making a drain (as in *Sutton v. Clarke*), and by doing so prejudice the rights or injure the property of third persons, they are not liable to an action, provided they do no more than the Act of Parliament under which they are acting authorizes and requires them to do, notwithstanding a private individual doing the same thing would have been liable whether he were guilty of negligence or not. If trustees under a turnpike act raise a road and thereby darken windows, no action will lie against them provided the act done by them is within the scope of the duty and authority conferred upon them. So, if injury result to a third person from the making of a drain, which would be actionable if done by a private individual, it will not be actionable if done by trustees in the performance of a duty cast upon them by an Act of Parliament. It may be observed that the act I have supposed to be done by the trustees is one which must necessarily produce damage, whether done carefully or not: but the qualification put in the case is this, that if the act authorized to be done by the trustees is done so carelessly or improperly that the careless or improper manner in which it is done either creates or increases the damage, the trustees will be liable. That class of cases, therefore, and the law established by them, do not bear at all directly upon the subject of the present inquiry, because, as I understand it, the complaint on the part of the plaintiff is that the defendants, the trustees, \*781] in the discharge of \*the duty cast upon them of keeping the road in repair, have been guilty of negligence whereby they have prejudiced the plaintiff's rights and injured his land. The way in which I understand it to be put is this,—and here I may at once say, that, when I speak of facts as being facts in the case, I only mean to say that there was evidence of those facts for the consideration of the jury, and I assume them to be facts for the purpose of this point. The facts, then, are these:—When the trustees entered upon their duties on this road, they found an open drain at the side of it; and the operation of that open drain was, that, when heavy rains caused a gush of water on the road, the drain carried it off to another watercourse, by means of which it was conveyed down to the canal, or otherwise dispersed itself so as to be innocuous to the owners of the adjacent lands. Such being the state of things, the trustees were advised to disturb it and to substitute another by covering the open drain, which would have the effect of

turning the gush of water on to the adjoining lands, unless that consequence was averted by placing sufficient catch-pits. Then, that which the plaintiff imputes to the trustees, is, that they were guilty of negligence in so changing the state of things as to accumulate the flow of water down the road on to the adjacent land, unless these catch-pits were properly constructed and kept in an efficient state, and that they were guilty of negligence as well in making insufficient catch-pits as in keeping those they had made in an improper and inefficient state. On that state of facts, I am of opinion that the jury might well be asked whether they would infer that the trustees had been guilty of negligence; and that question substantially I understand to have been left to them,—whether they had been guilty of negligence superinducing damage to the plaintiff's pits. A state of \*things certainly [\*782 might have arisen which might have occasioned the necessity of a good deal of consideration. Suppose the trustees had done their duty without any imputation of carelessness, and in a skilful and proper manner covered the old drain and constructed sufficient catch-pits to prevent injury to any person, and some one, without any default on their part, had done some act to obstruct the flow of water into the drain,—a question might have arisen whether any injury thus occasioned would give a cause of action against the defendants, they being trustees. But no such point arises here. It was left to the jury to say whether or not the defendants had been guilty of negligence; and they must be taken to have found that they had.

In considering the first point, I assume that an injurious act was done to the plaintiff by reason of the defendants' improper management of the catch-pits, whereby the water which ought to have passed down the drain was caused to flow into the plaintiff's pits. The question is, whether the plaintiff is bound to rest his complaint upon the original construction of the works, or whether he can maintain an action after the expiration of three months from that time. I am of opinion that the continuance by the defendants of that negligent and improper condition of the road under their charge, if accompanied by fresh damage to the plaintiff, constitutes a fresh cause of action, and it is in time if the action is brought within three months next after the accruing of such fresh damage. It is no doubt true that a fresh damage does not necessarily give a fresh cause of action. The foundation of that doctrine is to be found in the case of *Fetter v. Beale*, 1 Salk. 11. In an action for assault, battery, and maihem, the plaintiff declared that the defendant beat his head against the ground, and that he brought an action of assault and battery for that, and recovered, \*and that since that recovery, [\*783 by reason of the same battery, a piece of his skull came out. The defendant pleaded the recovery mentioned in the declaration in bar, and averred it to be for the same assault and battery. The plaintiff demurred. And Shower, pro quer. urged that this subsequent damage was a new matter which could not be given in evidence on the first recovery, when it was not known; and compared it to the case of a nuisance where every new dropping is a new act. If a man beat my servant and he die, I lose my action, and must proceed by indictment; and by the same reason that a matter *ex post* may defeat an action, it may also give an action. Sed, Holt, C. J., contra: "Every new dropping is a new nuisance, but here is not a new battery, and in trespass the griev-

ousness or consequence of the battery is not the ground of the action, but the measure of the damages, which the jury must be supposed to have considered at the trial." And judgment was given for the defendant. Now, here, I have not heard any satisfactory answer to Mr. *Gray's* argument. Suppose an action to have been commenced immediately after the first injury accrued to the plaintiff's pits from the flow of water down the road in question: when that cause came to be tried, the only question would be how much damage the plaintiff had actually sustained. It would be monstrous injustice to hold that the jury must assume that the defendants would persevere in their wrongful conduct, and that the damages must be assessed upon that assumption. All that the jury could do would be to find what damages the plaintiff had sustained from the wrongful act complained of: and they would be told to give him such damages as they might find he had sustained down to the time of the commencement of the action. According to the assumption, the plaintiff has sustained damage from the wrongful \*con-  
\*784] tinuance of the nuisance. Did the statute intend that he should have no remedy for that? The true answer to this objection, as it seems to me, is, that no fresh cause of action arises from each fresh damage, but that, where there is not only a fresh damage but a continuance of the cause of damage, such continuance of the wrongful act which caused the damage constitutes a fresh cause of action.

Having disposed of these two points, it remains only to consider whether there should be a new trial on the ground that the verdict was against the evidence. Without going the length of saying that the verdict was against evidence, yet, looking at the extreme obscurity of the case, I am of opinion that it would be more satisfactory that the defendants should have an opportunity for a reinvestigation, on payment of costs.

WILLES, J.—I am of the same opinion. With regard to the alleged misdirection, I am of opinion that the just result of the information we have upon the subject ought to lead us to the conclusion that the jury were told to find for the plaintiff, if they were of opinion that the defendants had by their negligent construction or keeping of the works in question occasioned injury to the plaintiff; and I think the finding of the jury involved a finding that the defendants had been guilty of negligence. That being so, I see no ground for granting a new trial for misdirection.

Then, as to the statutory limitation. That is a question of some considerable nicety. The difficulty arises less from the decisions themselves than from some of the expressions which have fallen from the several Judges, when considered with due reference to the facts of the cases with respect to which those expressions were used. I do not think it necessary, after what has fallen from my Brother Williams, in which I  
\*785] entirely concur, to refer to more than one of those cases, viz, *Bonomi v. Backhouse*, 1 Ellis, B. & E. 622 (E. C. L. R. vol. 96), where it was held, that, where damage had been done to the plaintiff's house by an excavation made by the defendant in his own land which had diminished the support to which the plaintiff's house was entitled, the period of limitation did not begin to run until the actual sinking of the building. That was the decision of the Exchequer Chamber.(a)

(a) Affirmed by the House of Lords,—*antè*, p. 777.

And I apprehend that that proposition was sufficient for the judgment the Court arrived at. They, however, thought proper to give an opinion that the judgment in *Nicklin v. Williams*, 10 Exch. 259,† was extrajudicial, because there had been an accord and satisfaction after the land had begun to suffer damage by the sinking. The Court go on to say, that, in that case, another principle applies, viz., "that no second or fresh action can under such circumstances be brought for subsequently accruing damage: all the damage consequent upon the unlawful act is in contemplation of law satisfied by the one judgment or accord." That is the part of the judgment on which special reliance has been placed by the defendant's counsel here. But that expression of opinion in *Bonomi v. Backhouse* was altogether unnecessary, though I do not mean to throw the slightest doubt upon it: it is enough to say that it was unnecessary for the decision of the question then before the Court. The cause of action there was, the injury accruing to the plaintiff from the wrongful act of the defendant in taking away from the plaintiff's house the support to which it was entitled: the Court decided, that, as it did not appear that there was any taking away of the support until the plaintiff's house sank, he had no cause of action until then: but that, when once that did appear, the plaintiff's cause of action [\*786] was complete. Compare that with this case. Here, the cause of action is, the injury done to the plaintiff's land. It cannot be said that the plaintiff had in any sense a right to prevent the trustees of the road from doing the works in question thereon. In *Bonomi v. Backhouse*, the plaintiff might in one sense have had a right that an excavation which probably might deprive his house of its natural support should not be made. Here, all the right the plaintiff could have would be, a right that the works should be done in such a manner as not to inflict injury upon him. No cause of action, therefore, could accrue to him until injury to his land arose: and the damages must necessarily be limited to that injury. Each recurrence of damage would constitute a new injury; and the Statute of Limitations would run from the time each cause of action arose. Upon that principle also the second ground of the rule fails. As to the evidence, I entirely concur with my Brother Williams.

BYLES, J.—I do not propose to add anything as to the alleged misdirection: but I wish to say a word or two with reference to the limitation clause. The case of *Bonomi v. Backhouse*, as the decision of a Court of error, is binding upon this Court: and it is in my opinion a decision which delivers this branch of the law from a great deal of confusion. It determines that the period of limitation for an injury of this sort runs from the time of the accruing of the damage, and not from the time of the act done. It however, leaves open the question whether it is to run only from the time of the happening of the first injury, or whether there may not be a new cause of action whenever any new injury may arise. My Brother Willes has alluded to one part of the judgment in that case. But I do not understand the Court as deciding this. In that \*case, however, there was a single damage follow- [\*787] ing one wrongful act. Here, the damage done to the plaintiff was the result of a negligent act of the defendants which could do no injury to the plaintiff until the occurrence of a violent storm. There would be a new and distinct injury every time a storm came; and this

declaration is in form a declaration for a continuance of a nuisance. I am unable to distinguish it from the case I have put. As to the evidence,—I am not prepared to say that the verdict was against the evidence; but the facts are so extremely confused, that I quite concur with the rest of the Court in thinking that justice will be done by allowing the cause to go down to a new trial, on payment of costs.

KEATING, J.—I entirely concur in the conclusion at which the rest of the Court have arrived. There clearly was no misdirection. The way in which it is suggested that there was misdirection, is, that the learned Judge told the jury that the defendants would be liable for the injury done by the water from the road flooding the plaintiff's pits, if they had not sufficiently provided for its safe transit to the canal. But it is clear that he accompanied that by a direction, that, if the jury thought that the damage which accrued to the plaintiff was caused by the negligence of the defendants, they would be responsible. It seems to me that that was a perfectly correct direction. As to the limitation of the action, it is certainly an extremely nice point. But it appears to me, notwithstanding the very able argument of Mr. *Phipson*, that the distinction pointed out by my Brother Willes between *Bonomi v. Backhouse* and the present case is well founded. Here is a continuance of the nuisance, and a new distinct and complete cause of action in respect thereof, for which I think the plaintiff had a \*right to sue. \*788] That is not inconsistent with the decision of the Exchequer Chamber in *Bonomi v. Backhouse*; and it avoids the case of injustice suggested by Mr. *Gray*, viz., that, in the other view, a recovery of 20s. would be a bar to a claim for subsequent damage to the amount of 1000l. or more, although occasioned by a continuance of the wrong. The question is one of great importance, and peculiarly a proper one for further consideration. The justice of the case, therefore, will be best answered by allowing the defendants to have a new trial on the condition proposed.

Rule absolute accordingly.

See *Bonomi v. Backhouse*, E., B. & gratuitous agent for negligence, see the E. 622, 658, and note, as to the ques- note of Mr. Wallace to *Coggs v. Bernard*, 1 Smith's Lead. Cas., 5th An- tion of limitation of action.

On the subject of the liability of a ed. 337; 1 Pars. Contracts 581.

## JONES and Wife v. MILLS. June 12.

The defendant had for several years occupied a cottage as tenant from week to week to one M. After the death of M., the defendant continued to pay his rent weekly to certain persons to whom M. had devised the premises. The devise being discovered to be void by reason of the Mortmain Act, the heir at law of M. by his agent demanded the rent, whereupon the defendant said that *he had received notice from the other party, and would not pay any more rent until he knew who was the right owner*:—Held, that this did not amount to a disclaimer or repudiation of the title of the heir at law, so as to entitle him to eject the defendant without any notice to quit.

*Seable*,—per Williams, J.,—that a tenancy from week to week can only be determined by a week's notice.

THIS was an action of ejectment brought to recover possession of one of several cottages at Wrexham, in the county of Denbigh.

The cause was tried before Channell, B., at the last Spring Assizes at Denbigh. The plaintiffs claimed as heirs at law of one John Mears, who died on the 12th of April, 1859, having bequeathed the property in question to the trustees of a chapel at Wrexham, called the Green Chapel, by a will which was void by reason of the Mortmain Act, 9 G. 2, c. 36.

There was no precise evidence as to the terms of the defendant's tenancy; but it appeared that he had for a \*considerable period [\*789 paid John Mears a rent of 1s. 3d. weekly, that, since the death of Mears, the rent had been received by the housekeeper of the chapel on behalf of the trustees, and that the trustees had paid the taxes.

This action was commenced in September, 1859. The defendant had no notice to quit: but it was proved, that, on being called upon for rent by one Clark, the agent of the plaintiffs, the defendant said he had received notice from "the other party," and that he would not pay any more rent until he knew who was the right owner; and this was relied on by the plaintiffs as evidence of a disclaimer.

On the part of the defendant, it was insisted that this was no disclaimer: and *Doe d. Williams v. Pasquali*, Peake N. P. C. 259, was relied on, where it was held by Lord Kenyon that a refusal to pay rent to a devisee under a will which was contested was not such a disavowal of the title as to entitle the devisee to maintain an ejectment without giving a previous notice to quit.

The learned Baron directed a verdict for the plaintiffs, reserving leave to the defendant to move to enter a nonsuit if the Court should be of opinion that the evidence did not warrant the jury in finding a disclaimer.

*M'Intyre*, in Easter Term last, obtained a rule nisi accordingly.—He referred to *Doe d. Lewis v. Lord Cawdor*, 1 C. M. & R. 398,† 4 Tyrwh. 852. [BYLES, J., referred to *Doe d. Williams v. Cooper*, 1 M. & G. 135 (E. C. L. R. vol. 39), 1 Scott N. R. 36.]

*Beavan and V. Williams* now showed cause.—A weekly tenant is not entitled to notice to quit. The defendant, therefore, having been a tenant to Mears at \*a weekly rent, his tenancy would end with [\*790 the week after Mears's death. [WILLES, J., referred to the Year Book, 13 H. 8, fo. 15 b, cited in Selwyn's N. P., 12th edit. p. 707.] In *Huffell v. Armitstead*, 7 C. & P. 56 (E. C. L. R. vol. 32), Parke, B., says: "Upon the question of the necessity of a notice to quit, the law is clearly settled, that a yearly tenancy cannot be deter-

mined without half a year's notice. But that rule cannot be applied to a weekly taking; for, the effect of it would be to show that a half week's notice was necessary to put an end to such a tenancy. I am not aware that it has ever been decided, that, in the case of an ordinary monthly or weekly tenancy, a month's or a week's notice to quit must be given. The cases that have been cited (a) are not authorities in support of that proposition. A tenant who enters upon a fresh week may be bound to continue until the expiration of that week, or to pay the week's rent: but this is a very different thing from giving a week's notice to quit." [BYLES, J.—What evidence was there here that the tenancy was determined? At the very lowest, the defendant was a tenant at will or at sufferance: he clearly was not a trespasser. ERLE, C. J.—Baron Parke does not say that the weekly tenant must go at a moment, under pain of an ejectment; but only that he cannot insist upon a week's notice.] In *Towne v. Campbell*, 3 C. B. 921 (E. C. L. R. vol. 54), Coltman, J., seemed to think a week's notice necessary. [WILLIAMS, J.—Lord Ellenborough, in *Kemp v. Derrett*, 3 Camp. 510, held a three months' notice to be necessary in the case of a holding from three months to three months. The authorities do not help much one way or the other.] There was ample evidence of disclaimer: the defendant refused to pay rent to the plaintiff until satisfied as to his title. This he clearly \*791] had no right to do. Very slight evidence of disclaimer will suffice. In *Doe d. Davies v. Evans*, 9 M. & W. 48,† lands being held by G. as tenant from year to year to D., D., who died in 1837, devised the same to trustees for the term of one hundred and forty years, upon trust (inter alia) to permit his wife E. D. to take the rents and profits thereof during her life. G. paid the rent to E. D., the widow, after D.'s death, from 1837 to 1840, and, on receiving a notice to quit from her in March, 1840, stated that he did not think she would turn him out of possession, as she had promised he should continue on as tenant from year to year. In an action of ejectment brought by the trustees for the recovery of the premises, it was held that this was sufficient evidence of a disclaimer by G. of the title of the trustees to warrant the jury in finding a verdict for the plaintiff. Parke, B., there said: "The statement of G. that Mrs. D. had promised him that he should not be removed, but continue as tenant from year to year, affords some evidence of his having agreed to hold under the tenant for life, whereby he disclaimed the title of the trustees. And that, accompanied by his having paid rent to her, is evidence to go to the jury of attornment to the tenant for life, and of repudiation of the title of the trustees. In a case like the present, slight evidence would be sufficient to remove a mere technical objection." In *Doe d. Whitehead v. Pittman*, 2 Nev. & M. 673 (E. C. L. R. vol. 28), "I have no rent for you, because A. B. has ordered me to pay none," was held to be evidence of a disclaimer of tenancy. In *Doe d. Calvert v. Frowd*, 1 M. & P. 480 (E. C. L. R. vol. 17), 4 Bingh. 557 (E. C. L. R. vol. 13), the defendant held premises under a tenant for life, on whose death possession was claimed and rent demanded by the heir at law of the devisor; whereupon the defendant wrote to the attorney of the heir at law, stating, that he held as tenant

(a) *Doe d. Parry v. Hazell*, 1 Esp. N. P. C. 94, and *Roe d. Peacock v. Raffan*, 6 Esp. N. P. C. 4.

to J. S. (the husband of \*the tenant for life), in right of his wife, that he had never considered the claimant as landlord of [\*792 the house, that he should be ready to pay the arrears to any person who should be proved to be heir at law, but that he must decline taking upon himself to decide upon the claim made on him, without more satisfactory proof in a legal manner. It was held that this letter amounted to a disclaimer of the title of the heir at law; and that he might maintain ejectment against the tenant, without giving him a notice to quit. Reliance will probably be placed on the case of *Doe d. Williams v. Pasquali*, Peake N. P. C. 196, where Lord Kenyon ruled that a refusal to pay rent to a devisee under a will which was contested, was not such a disavowal of his title as to entitle such devisee to maintain ejectment without giving a previous notice to quit. But, besides the doubt which is thrown upon that case by Best, C. J., in *Doe d. Calvert v. Frowd*, the case differs essentially from the present. There, there was an offer to pay the rent to whomsoever might be entitled. But here, not only has there been payment of rent to a party claiming adversely, but there is an express refusal to pay any more rent to any one until the right is determined. [ERLE, C. J.—The true question here is, whether the disclaimer amounts to a dispensation with a notice to quit.] In *Doe d. Graves v. Wells*, 10 Ad. & E. 427 (E. C. L. R. vol. 37), 2 P. & D. 396, it was held that a tenant for a definite term of years does not forfeit his term by orally refusing, upon demand of the rent made by his landlord, to pay the rent, and claiming the fee as his own. Patteson, J., there says: "It is sometimes said that a tenancy from year to year is forfeited by disclaimer: but it would be more correct to say that a disclaimer furnishes evidence in answer to the disclaiming party's assertion that he has had no notice to quit; inasmuch as it \*would be idle to [\*793 prove such a notice where the tenant has asserted that there is no longer any tenancy." There is no evidence of that sort here. In *Doe d. Williams v. Cooper*, 1 M. & G. 135 (E. C. L. R. vol. 39), 1 Scott N. R. 36, the defendant took premises of one H., at a yearly rent, with an agreement for a lease for seven years or for the lease for lives under which H. held the property. H. subsequently assigned his interest in the premises to the lessors of the plaintiff, and their attorney, under an impression that the seven years had expired, demanded possession. The defendant said, "I hold on lives, and as long as they live I will hold the premises; you know I have an agreement." The attorney then demanded a quarter's rent which was due, but the defendant refused to pay it, saying, "I hold under H., and I was directed by him to pay K. (who was the superior landlord), and I will do so; for, how do I know he will not come and make a demand on me?" And it was held that this was no disclaimer of the title of the lessors of the plaintiff. Tindal, C. J., there says: "A disclaimer, as the word imports, must be a renunciation by the party of his character of tenant, either by setting up a title in another, or by claiming title in himself." Here, there was an absolute refusal to pay rent to the plaintiffs, and a repudiation of their title. It was a question for the jury with what intention that refusal took place.

*Hayes*, Serjt., and *M Intire*, in support of the rule.—This was not a tenancy for a week certain, but at the lowest a tenancy from week to week, and the defendant was entitled to a week's notice. Assuming

that it was a mere tenancy at will, it could not have been determined without *some* notice: Doe d. Parry v. Hazell, 1 Esp. N. P. C. 94; Roe d. Peacock v. Raffan, 6 Esp. N. P. C. 4; Kemp v. Derrett, 3 Campb. 510. \*Huffell v. Armitstead, 7 C. & P. 56 (E. C. L. R. vol. 32), \*794] was the case of furnished apartments. [WILLIAMS, J.—I must confess I do not quite follow my Brother Parke's reasoning in that case.] In Towne v. Campbell, 3 C. B. 921, the question was whether the tenancy was quarterly or weekly; and the jury found that it was weekly, and that notice had been duly given. To constitute a disclaimer, there must be a distinct and unequivocal renunciation of the tenancy. It is impossible to distinguish this case from Doe d. Williams v. Pasquali, Peake N. P. C. 196. In Doe d. Gray v. Stanion, 1 M. & W. 695, 702,† Parke, B., says: "In the earliest reported case on this subject, Throgmorton v. Whelpdale, Bull. N. P. 96, it is said that such notice [a notice to quit] is necessary, unless the tenant have *attorned* to some other person, or done some other *act* disclaiming to hold as tenant to the landlord. In Doe d. Foster v. Williams, Cowp. 622, Lord Mansfield says, where the *possession is adverse*, no notice is necessary; and in that case there had been an attornment, or what was equivalent, for, the defendant defended as landlord to the tenant from year to year. But this rule is too narrow: and, from subsequent cases, it does not appear to be necessary that any act should be done, as distinguished from a verbal disclaimer; a disavowal by the tenant of the holding under the particular landlord, by words only, is sufficient. Lord Kenyon, in Doe d. Williams v. Pasquali, says, that, 'if the tenant puts *his landlord at defiance*, he might consider him either as a tenant or trespasser, and eject him without any notice to quit;' and in Bower v. Major, 1 Brod. & Bingh. 4 (E. C. L. R. vol. 5), in the analogous case of a composition for tithes, the declaration of an occupier who refused to set out his tithes in kind, insisting that he was *exempted by a modus*, was held to be a sufficient \*795] disclaimer of the composition, so as to dispense with \*half a year's notice to determine it: and in other cases, in which the declaration of the tenant has been held insufficient, (a) no question has been raised as to the necessity of some *act* being done by the tenant, as distinguished from a disavowal by word or writing. But, in order to make a verbal or written disclaimer sufficient, it must amount to a *direct repudiation of the relation of landlord and tenant*, or to a distinct claim to hold possession of the estate upon a ground wholly inconsistent with the existence of that relation, which by necessary implication is a repudiation of it. An omission to acknowledge the landlord as such, by requesting further information, will not be enough." That is precisely in point. Here, the defendant by his conduct repudiates the devisee's title, not that of the heirs at law. Mere payment of rent to a person not entitled to receive it, is no disclaimer of the title of the person who is really entitled: Doe d. Dillon v. Parker, Dow, N. P. C. 180. [WILLIAMS, J.—There was a lease there. The landlord was not hurt by the payment to a stranger.] In Doe d. Whitehead v. Pittman, 2 N. & M. 673 (E. C. L. R. vol. 28), the defendant having come in under the plaintiff, a refusal to pay rent to him was an express repudiation of his title. So, in Doe d. Calvert v. Frowd, 1 M. & P. 480 (E. C. L. R. vol. 17), 4 Bingh. 557 (E. C. L. R. vol. 13), there was an express repudiation of

(a) Doe d. Williams v. Pasquali; Doe d. Lewis v. Lord Cawdor.

the lessor's title, and a setting up the title of another. That is very different from a tenant's pausing to make inquiry before he yields to the demand of a new claimant. Tindal, C. J., says in *Doe d. Williams v. Cooper*, "There are authorities to show that a tenant honestly inquiring into the title of a claimant, is not thereby guilty of a disclaimer." The definition which that learned judge there gives of a disclaimer is something very different \*from what was done here; for, here the defendant neither claims title in himself nor does he set up the title [ \*796 of another.

ERLE, C. J.—I am of opinion that this rule should be made absolute. The ejectment is brought against one who had been for several years in possession of the premises as a tenant from week to week. The landlord having died, the defendant went on paying rent to persons whom he conceived to be entitled to receive it. When it was discovered that those persons had no title, and the heir at law turned up, the defendant objected to pay any more rent till he knew who was the right owner. The question is whether by so doing he has been guilty of a disclaimer or renunciation of the title of his landlord, so as to disentitle him to a notice to quit. I adopt the definition of a disclaimer which is given by Tindal, C. J., in *Doe d. Williams v. Cooper*, 1 M. & G. 135 (E. C. L. R. vol. 39), 1 Scott N. R. 36,—“A disclaimer, as the word imports, must be a renunciation by the party of his character of tenant, either by setting up a title in another, or by claiming title in himself.” Here, the defendant did not set up the title of another, neither did he affect to claim title in himself: but he required further information before he would pay the rent to anybody. He acknowledged himself to be tenant, and was ready to pay rent to the right person. What passed did not in my judgment amount to a disclaimer. I also think that the tenant, having held for several years, was not liable to be turned out at the end of any week, without notice. I cannot find any authority for saying that his tenancy was determined at the end of each week. The rule which applies to tenancies from year to year has never, it seems, been extended to the case of a weekly or monthly tenant: but, though it has been laid down that a weekly or a \*monthly holding does not [ \*797 require a week's or a month's notice to determine it, unless there be some special agreement or some custom, I do not find that any person has ever held that the interest of a tenant so holding may be put an end to without any notice at all. It would be most unreasonable if a landlord was held to be entitled to turn his weekly tenant out at twelve o'clock at night on the last day of the week. Some notice must be necessary; and, none having been given here, the action has been prematurely brought, and the rule to enter a nonsuit must be made absolute. I should feel inclined to hold, upon the authority of *Thunder d. Weaver v. Belcher*, 3 East 449, that the tenant ought not to be ejected until after such a demand of possession as would give him a reasonable time to get out: but I cannot, without further consideration, prevail upon myself to lay down any precise rule. One cannot but feel great regret, that, after all the expense the plaintiffs have incurred, the case should be disposed of upon a minor point, the omission of a mere formality. But we are bound to give our judgment upon the matter as brought before us; and the only conclusion I can come to is, that the

plaintiffs have commenced their ejectment before the defendant's holding has been lawfully put an end to.

WILLIAMS, J.—I entirely concur in thinking that this rule must be made absolute. We have nothing to do with the merits. The contention on the part of the defendant is, that he occupied the cottage in question under a tenancy from week to week, which, by the understanding of the parties at the time of the demise, was only to be determined by either giving proper proof of his wish that such tenancy should cease. That proper proof, viz., a notice to quit, has not been given; nor has it \*798] been dispensed with by anything \*that has occurred. It appeared that the defendant had held the premises for many weeks at a weekly rent. It cannot be said that there was a new contract each week: it must have been a tenancy from week to week for so long as the parties should respectively please. If it had been a tenancy from year to year, it would have undoubtedly subsisted until it was terminated by a proper notice. The question is whether there is in this respect any difference in principle between a tenancy from week to week and a tenancy from year to year. I apprehend that in either case there must be a legal expression of intention that the tenancy should cease. There certainly is no direct authority upon the subject: but, upon principle, I do not see how a party holding on the terms that his tenancy should continue until his landlord evinced an intention that it should cease, can be turned out of possession without any notice at all. Assuming that some notice was necessary, the question is whether the notice has been dispensed with. That which was proved here clearly would not have amounted to a disclaimer if the question had been as to the forfeiture of a lease for a term of years: nor do I think it amounted to a dispensation with notice to quit. To constitute a disclaimer, the act of the tenant must be a distinct repudiation of the relation of landlord and tenant. I do not think the evidence in this case amounted to that. How long the notice should be it is unnecessary upon this occasion to determine, inasmuch as none was given. But the inclination of my opinion is, that, where the holding is from week to week, a week's notice should be given, and a month's notice where the holding is from month to month.

WILLIAMS, J.—Upon the question of disclaimer, I have nothing to add. \*799] As to the other point, I can quite \*understand that the law may be as laid down by my Lord and my Brother Williams; and, as they think so, and my Brother Byles also, I believe, I have no doubt that the inference of law arising from a contract of tenancy like this, is, that it should continue from week to week until put an end to by the one party or the other expressing his dissent to its continuance, and that such dissent cannot be so expressed as to put an end to the tenancy before the end of the current week. I am ready to adopt that view: but, to say as matter of law, that a week's notice is necessary, is a proposition which I am not prepared to assent to. It is clear, that, in contemplation of law, a lease for a week stands upon precisely the same footing as a lease for a year or any number of years. Whether it be for a week or for one or more years, such a lease would come to an end at the expiration of the term. That is the general rule. An exception has been made in the case of a tenancy from year to year,—a peculiar tenancy which grew out of the tenancy at will. The Judges, seeing the

inconvenience of so uncertain a holding, and that the tenant was usually entitled to emblements, very early adopted the inference that it was intended that the tenancy should be a tenancy to be put an end to by either party expressing such to be his will, but only at the end of the year; and they superadded to that, what is expressed in the Year Book 13 H. 8, fo. 13 b, viz., that it must be a half-year's notice. Thus we have the general rule of law that no notice was necessary; and then we have the exception established for the sake of convenience, that in the case of a tenancy from year to year, the notice to determine it shall be a six months' notice. By parity of reasoning, I do not see how it is possible to infer that a tenant from week to week is entitled to any notice unless it be half a week's notice, as was suggested by Parke, B., \*in [\*800 *Huffell v. Armitstead*, 7 C. & P. 56 (E. C. L. R. vol. 32). It is impossible to infer from the authority in the Year Book, that there must be a week's notice: nor do I find any authority, or any analogy in the law, to sustain that proposition. Opposed as my notion is to that of my Brother Williams, I do not doubt that I am wrong: but I cannot help thinking that the doctrine is a novelty and an unnecessary novelty, and therefore I object to its introduction. I beg, however, that I may not be understood as expressing any dissent from the decision of the Court.

BYLES, J.—I also am of opinion that this rule should be made absolute. I much regret that the case should be thus decided upon a point far removed from the merits: but that is the fault of the plaintiffs, who have resorted prematurely to an action of ejectment. The first question is, was any notice to quit necessary? Ever since the time of Henry 8, a tenancy from year to year has been determinable only by a six months' notice ending with the current year. It seems to me that the same convenience which dictated the notice there, makes it also necessary that a tenancy from week to week should be determinable only upon a reasonable notice. It may be that the law has not yet determined what that notice shall be. The state of the authorities seems to be this:—There is *some* authority for saying that a week's notice is *not* necessary; but there is no authority defining what notice *is* necessary. I would rather, therefore, decide the present case on the ground that no notice at all was given, whereas the law requires a reasonable notice, without taking upon myself to say what notice would be reasonable. (a) The tenancy here was treated by all \*parties as a tenancy from [\*801 week to week. That tenancy, therefore, continues, unless there has been a disclaimer. Does that which occurred here amount to evidence of disclaimer? Tindal, C. J.,—one of the highest authorities upon such a subject,—in *Doe d. Williams v. Cooper*, 1 M. & G. 135 (E. C. L. R. vol. 39), 1 Scott N. R. 36, states the rule thus: "A disclaimer, as the word imports, must be a renunciation by the party of his character of tenant, either by setting up a title in another, or by claiming title in himself." Comparing that with the passage in Buller's *Nisi Prius*, p. 96, it seems to me that that rule is equally applicable to a weekly tenancy. Here, the defendant had paid his rent to the persons

(a) If reasonableness be a question for a jury (as it must be), there can be little doubt that they would be guided by the universal understanding and practice, in the case of lodgings and small tenements, to give or receive a week's notice where the hiring is by the week, a month's notice where the hiring is by the month, and a quarter's notice where the hiring is quarterly.

whom he thought entitled to receive it. How can it be said that he repudiated the plaintiff's title before he had any notice of it? In *Doe d. Gray v. Stanion*, 1 M. & W. 695,† Parke. B., says, that, to constitute a disclaimer or renunciation of the landlord's title, there must be a distinct repudiation of the relation of landlord and tenant. Payment of rent to a stranger under a bonâ fide mistake can be no disclaimer. Could it be contended for a moment that an estate worth 1000*l.* a year was forfeited by such an act? The evidence from which it is sought to establish a disclaimer here was, that, when applied to for rent by the plaintiff's agent, the defendant said he had received notice from the other party, and would not pay any more rent until he knew who was the right owner. That was a negative pregnant with an affirmative that the right owner when ascertained would be paid. I cannot hold that to be a repudiation of the plaintiff's title. Whatever, therefore, be the merits of the case, I have no \*hesitation in saying that our decision ought to be in favour of the defendant.

WILLIAMS, J.—I wish to add that I was much influenced in my notion that there should be a week's notice to determine a weekly tenancy, by what is said by Lord Mansfield in *Right d. Flower v. Darby*, 1 T. R. 159, 162, and by Lord Ellenborough in *Kemp v. Derrett*, 3 Campb. 510.

WILLES, J.—That would no doubt be a very convenient rule to establish: but it is not necessary so to decide for the determination of this case.

Rule absolute

### CHAPPEL v. COMFORT and Another. May 29.

A cargo of potatoes was shipped from Dunkirk to London under a charter-party by which the charterer contracted to pay certain freight, and was to have sixteen days for loading and unloading, and to pay 2*l.* per day for any detention of the vessel beyond that period. By the bill of lading, the cargo was deliverable to the consignees in London, or order, "he or they paying freight as per charter-party." In the margin of the bill of lading was the following memorandum—"There are eight working days for unloading in London:—"

Held, that the consignees, by accepting the cargo under this bill of lading, incurred no liability for demurrage, although the vessel was detained for four days beyond the time mentioned.

THIS was an action against the endorsees of a bill of lading for demurrage on a cargo of potatoes.

The declaration stated that a certain cargo of potatoes was shipped on board a vessel called the *Auspicious*, of which the plaintiff was master, to be delivered according to the terms of a bill of lading (which was set out), which bill of lading was endorsed to the defendants; and that, in consideration that the plaintiff, at the request of the defendants, would deliver to the defendants as such endorsees, and would suffer \*them to take the said cargo according to the terms of the said bill of lading, the defendants promised the plaintiff to accept and take the said cargo on the terms of the said bill of lading, and to discharge the vessel in eight working days, as in the said bill of lading provided,—breach, that the defendants did not discharge the vessel within the said eight working days so allowed for the working thereof, but kept and detained the vessel over and above the said eight working days. There were also the common counts.

The defendants pleaded, among other pleas, a denial of the contract as alleged.

The cause was tried before Byles, J., at the first sitting in London in Easter Term last. The facts were as follows:—The plaintiff was the master of the ship *Auspicious*, which was chartered at Dunkirk by certain persons trading there for the conveyance of a cargo of potatoes to London. By the charter-party, the charterers agreed to pay a certain freight: sixteen days were to be allowed them for loading the ship at Dunkirk and unloading her in London; and the charterers were to pay demurrage at the rate of 2*l.* per day for any detention of the ship beyond the laying days. The cargo was consigned to the defendants, merchants in London, under a bill of lading making the goods deliverable to them or order "paying freight as per charter-party." And in the margin of the bill of lading was written the following memorandum,— "There are eight working days for unloading in London." The vessel was detained four days beyond the eight. The defendants, who as consignees received the cargo, paid the freight, but declined to pay demurrage: whereupon this action was brought.

On the part of the defendants, it was insisted that the only contract in the bill of lading which was binding on them was, to pay the stipulated freight: and \*they relied on *Smith v. Sieveking*, 4 Ellis & B. 945 (E. C. L. R. vol. 82), in error, 5 Ellis & B. 589 (E. C. L. R. vol. 85). [\*804

For the plaintiff it was submitted that the memorandum in the margin sufficiently incorporated into the bill of lading all the conditions contained in the charter-party, and consequently that the defendants were only entitled to have the goods delivered to them on payment of demurrage as well as freight. *Wegener v. Smith*, 15 C. B. 285 (E. C. L. R. vol. 57), was referred to.

Under the direction of the learned Judge, a verdict was found for the plaintiff, damages 8*l.*,—leave being reserved to the defendants to move to enter a nonsuit, if the Court should be of opinion that they were not liable for the demurrage.

*David Keene*, in Easter Term, obtained a rule nisi accordingly.

*Barnard* (with whom was *Edward James*, Q. C.) now showed cause. —A consignee or assignee of a bill of lading who receives goods with an intimation upon the face of the document under which he receives them that a sum will be payable for demurrage, is as much bound to pay for the detention of the ship beyond the laying days as he is for the freight. Here, the charter-party, besides stipulating for the payment of the freight, gives the charterers a right to sixteen days for loading and unloading, and then stipulates, that, for any detention of the ship beyond that number of days, demurrage shall be paid at the rate of 2*l.* per day. The bill of lading makes the cargo deliverable to the consignees or order, "he or they paying freight as per charter-party;" and in the margin there is a memorandum that "there are eight working days for unloading in London." The consignees, therefore, had notice that they were entitled to receive the cargo \*on payment of the freight mentioned in the charter-party, and also notice that under the terms of the charter-party there remained only eight days during which they were entitled to detain the ship at the expense of the owner. It is the duty of the consignee, if he accepts the cargo, to unload the [\*805

ship within the number of days mentioned: and, if he detains her beyond that time, that affords some evidence of a promise on his part to pay for that detention. Erle, C. J., in delivering the judgment of the Court in *Stindt v. Roberts*, 17 Law J., Q. B. 166, says: "The principle on which the consignee is taken to contract for the freight and demurrage mentioned in the bill of lading, applies in respect of other stipulations therein mentioned; and the promise to pay demurrage in case of detention is in effect a promise to discharge within the limited time, or pay for the detention." [WILLIAMS, J.—Lord Wensleydale, in *Young v. Moeller*, 5 Ellis & B. 755, 762 (E. C. L. R. vol. 85), observes upon that,—“It is enough to say that my Brother Erle’s decision, properly understood, goes no further than to establish that the endorsee of the bill of lading is, upon receiving the cargo, *bound by its terms*.” ERLE, C. J.—The contract is with the consignor: the assignee of the bill of lading only becomes liable on the ground that he assents to take the goods subject to the terms imposed by the bill of lading.] In *Wegener v. Smith*, 15 C. B. 285 (E. C. L. R. vol. 80), a mere reference to the charter-party was held sufficient to incorporate all its terms into the bill of lading. [BYLES, J.—There, the reference to the charter-party was in the conditional part of the bill of lading. It is not so here, but in the margin. *Jesson v. Solly*, 4 Taunt. 52, is rather more in your favour.] Sir James Mansfield in that case says: “This is quite a new case, arising from the new state of trade; and there is great weight in the observation made for the plaintiff, that many of these \*806] \*ships, coming from a foreign country, to which they may never go again, put into their bill of lading a condition which enables them to look to the consignee for demurrage, as well as for freight. My Brothers are very clearly of opinion, that, if the consignee will take the goods, he adopts the contract.” Heath, J., says: “It is clear the plaintiff is entitled to demurrage either from the consignor or consignee. Demurrage is only an extended freight; and the consignee, by adopting this bill of lading, makes himself liable to demurrage as well as to freight.” And Chambre, J., adds: “It would be monstrous if the consignee, accepting the contract with knowledge of the terms, should not be bound by it, and could send the captain back to the consignor for demurrage.” It is enough to say that there was evidence to go to the jury.

*David Keene*, in support of the rule.—In *Jesson v. Solly*, 4 Taunt. 52, the report does not give the terms either of the charter-party or of the bill of lading; and it is evident that the delivery of the goods was to be conditional on the performance of the terms mentioned, viz., payment of freight *and demurrage*. Here, the words are not conditional. If the contract here had been as in *Harman v. Clarke*, 4 Campb. 159,—“to be taken out in fourteen days after arrival, or to pay 80s. a day demurrage,” there might have been ground for contending that, by receiving the goods, the consignees bound themselves to perform the condition. But here the words merely convey an intimation that “there remain eight working days for unloading in London.” In *Smith v. Sieveking*, 4 Ellis & B. 945, 952 (E. C. L. R. vol. 82), Lord Campbell, in delivering the judgment of the Court of Queen’s Bench, says: “By the bill of lading, the goods were deliverable to the defend-

ants, they 'paying for the said goods \*as per charter-party.' [\*807] Had the words been 'paying *freight* for the said goods as per charter-party,' the action could not have been maintained; and the reference to the charter-party must be considered merely to ascertain the rate of freight. The expression is 'paying for the said goods:' but, is not the natural meaning of the words so used, 'paying for the carriage of the goods from Memel to London at the rate mentioned in the charter-party?' Can it be extended to a payment for the detention of the ship at Memel by the shipper, before the bills of lading were signed,—a fact of which the consignee knew nothing, and of which the charter-party would not inform him? If the consignee is to be held liable for demurrage as well as freight, surely the bill of lading should contain a clear intimation to that effect, as was suggested by Lord Tenterden in *Evans v. Forster*, 1 B. & Ad. 118 (E. C. L. R. vol. 20)." And the same learned Judge, in *Moeller v. Young*, 5 Ellis & B. 7, 19 (E. C. L. R. vol. 85), says: "Where the bill of lading makes no mention of demurrage, the assignee will make himself liable to nothing beyond the freight: but, if there be a reference to the charter-party, he by demanding under such a bill of lading, makes himself liable to pay freight at the rate which the charter-party prescribes." Here, the statement of the number of days remaining was a simple memorandum for the protection of the contracting party. [BYLES, J.—The memorandum is on an assignable instrument. If your construction is right, it would be more natural that the memorandum should be found upon the document which binds the party contracting.] To put it upon the charter-party would convey no information to the assignee of the bill of lading.

ERLE, C. J.—I am of opinion that this rule must be made absolute. The action is brought by the master \*of a ship against the assignees of a bill of lading; and the former contends that the [\*808] latter made a promise to pay demurrage for the ship's detention beyond eight working days, as well as freight. The question, therefore, is, whether the bill of lading contains any evidence that the defendants made any such promise. As between the shipowner and the shipper of the cargo, there was a charter-party: and the bill of lading was made and signed by the master acting under a charter-party. It is also to be observed that the express promise here is, to pay freight according to the charter-party; and nothing is to be gathered from the bill of lading itself to show that the assignees of it was to pay any sum for the detention of the vessel beyond the eight working days. It has been contended on the part of the plaintiff that the memorandum in the margin,—“There are eight working days for unloading in London,”—was a notice to any person to whose hands the document should come that it imposed upon him an obligation to pay demurrage if the vessel were delayed more than eight days in unloading. On the other hand, it is insisted that that memorandum has not the effect of creating a promise to pay demurrage, and, at all events, not a promise to pay the demurrage specified in the charter-party. I am of opinion that the defendants' contention is right. I quite agree with the cases of *Stindt v. Roberts*, 17 Law J., Q. B. 166, 5 D. & L. 460, *Jesson v. Solly*, 4 Taunt. 52, and *Wegener v. Smith*, 15 C. B. 285 (E. C. L. R. vol. 80), that, if the bill of lading contains a promise on the part of the shipowner to deliver the goods on performance of a condition, if the assignee fails to

perform his duty by complying with the condition, he is not entitled to the goods; and that the law infers a promise on the part of the assignee \*809] \*shall be done by him, if the shipowner parts with his lien. In those cases the construction of the contract was, that the assignee of the bill of lading was to pay freight and demurrage if the vessel were detained beyond the number of laying days stipulated for. That was the principle upon which the decision in *Stindt v. Roberts* proceeded. In *Wegener v. Smith*, the goods were by the bill of lading made deliverable to order "against payment of the agreed freight and other conditions as per charter-party." One of the conditions in the charter-party was the payment of demurrage: and therefore it was held that the acceptance of the goods under that bill of lading was an implied undertaking to pay demurrage. So, in *Jesson v. Solly*, there was a memorandum at the foot of the bill of lading which the Court construed to amount to a contract on the part of the assignee to pay the stipulated demurrage. I distinguish the present case from these, on the ground that I cannot gather from the words written in the margin of this charter-party that it was the intention of the parties that the assignee should pay the demurrage mentioned in the charter-party. One important distinction is, that here no sum is mentioned in the margin. Passing from hand to hand, as these documents do, it is important that the parties receiving them should be able at once to learn the extent of the liability they incur by accepting the goods. For these reasons, I think the defendants are entitled to have their rule made absolute.

WILLIAMS, J.—I am of the same opinion. I ground my concurrence on this, that, in this particular case, the memorandum in the margin of the bill of lading is not to be taken to refer to the charter-party, and does not constitute a contract between the master and the assignee of \*810] the bill of lading for the payment of \*demurrage by the latter. If it had formed part of the contract, I see no reason for departing from the principle established in *Jesson v. Solly*, that the consignee of the bill of lading by accepting the goods becomes bound by the contract contained in the instrument.

WILLES, J.—I am of the same opinion. It is exceedingly important that we should adhere to the known rules of law upon this subject, which are as well (or perhaps better) known in the city of London as they are in Westminster Hall. One of those rules is, that, where a charter-party is entered into, the special provisions of that charter-party are binding only as between the charterer and the shipowner: and that, if a bill of lading is signed by the master, and that bill of lading comes to the hands of an assignee for value, the latter is entitled to have the goods delivered to him on the terms mentioned in the bill of lading, and properly speaking he is not bound to refer to the charter-party at all. It is exceedingly important that that should be so, and that having paid his money for the bill of lading, he shall be entitled to demand the goods, subject only to the payment of the charges mentioned in the document. Accordingly, it has always been understood under ordinary circumstances that the assignee of a bill of lading is not liable for anything beyond the stipulated freight. It may be, that, for shortness, instead of stating the sums payable in respect of different kinds of goods, a reference is made to the charter-party, thus,—“paying freight as per charter-par-

ty:" but it is equally well established, that, even in that case, the assignee of the bill of lading is only bound by the terms of the charter-party quoad the freight. It may be, and it often does happen, that the person who receives the goods intends to pay all the charges mentioned in the \*charter-party. But, when it is intended that such an obligation [\*811 should be imposed upon him, it should be done in plain words, as was done in *Wegener v. Smith*, 15 C. B. 285 (E. C. L. R. vol. 80), and other cases, where by the terms of the bill of lading the goods were made deliverable to order "against payment of the agreed freight and other conditions as per charter-party." In that case, the assignee of the bill of lading is properly held to be bound to look to the terms of the charter-party, and to perform them so far as they apply to the goods. Another class of cases is, where there is an express contract apart from the bill of lading. The person receiving the goods there is bound by what is technically speaking a new contract. There is also another class of cases, viz., where there is no charter-party at all. To that class belong the cases of *Jesson v. Solly*, 4 Taunt. 52, and *Stindt v. Roberts*, 17 Law J., Q. B. 166, 5 D. & L. 460, where the bill of lading constituted the entire contract. The person who receives the goods under that bill of lading, if demurrage is mentioned, is bound to pay demurrage, because it is provided for by the contract. It would be inconvenient to make a distinction between that which appears in the margin of the bill of lading and that which is in the body of the instrument. Indeed, I should rather be disposed to give greater effect to that which is *written* in the margin or at the foot. The class of cases last mentioned is one standing entirely by itself. In each there must be a plain indication of intention that the consignee or assignee shall pay freight, otherwise he is not liable. Apply that rule here. There is in the charter-party a contract between the charterer and the owner that sixteen days should be allowed for loading and unloading, and that the charterer should pay demurrage at the rate of 2*l.* per day for any detention of the ship beyond that number of days. By the bill of \*lading the cargo is made deliverable to the consignees in Lon- [\*812 don, on payment of freight according to the charter-party. The memorandum in the margin does not refer to any sum to be paid for demurrage. It is simply this,—“There are eight working days for unloading in London.” The statement of that fact is quite as consistent with the owner's looking to the charterer for payment of demurrage as to the consignee. Although I have drawn a distinction between cases where there is and where there is not a charter-party, I do not say that there is any real distinction between the two. There must in either case be a plain intention expressed that the consignee of the bill of lading is to pay demurrage, before he can be charged with it. This is an established rule, to which, as I before observed, it is highly important to adhere.

BYLES, J.—I also think this rule should be made absolute. By the charter-party it is provided that sixteen days shall be allowed for loading and unloading the cargo, and that for any detention of the ship beyond that time the charterer shall pay demurrage at the rate of 2*l.* per day. What are the obligations as between the charterer and the shipowner, therefore, is clear. The bill of lading makes the cargo deliverable to the consignees or order, “he or they paying freight as

per charter-party." Strictly speaking, the payment of freight is a condition precedent to the right to demand the goods, though in practice it is made a condition subsequent. In the present case, the payment of demurrage is not made part of that which becomes a condition subsequent. I feel bound to say that the only condition here is, to pay the freight. I must, however, say, that, if the words written in the margin of this bill of lading had been in the body of the instrument, I for one \*813] should not have \*been disposed to put this construction upon it; nor do I say that I should have come to the same conclusion if there had been no charter-party. It may well be that the memorandum was inserted in the margin of the bill of lading for the information and guidance of all the parties concerned. Upon these grounds, I think we cannot consistently with the cases hold the plaintiff to be entitled to retain his verdict. Rule absolute.

### HOWLETT v. TARTE. June 20.

To an action for rent (or a sum in gross) under a building agreement dated the 29th of September, 1853, the defendant pleaded, that, after the making of that agreement, it was agreed between the parties that a tenancy from year to year should be created in substitution for the former tenancy under the agreement; that notice to quit was duly given, which notice expired at Michaelmas, 1858; that the defendant quitted accordingly; and that no rent ever became due from the defendant to the plaintiff in respect of the premises after the last-mentioned day.

To this plea, the plaintiff replied, by way of estoppel, that he brought an action against the defendant for the recovery of rent as having accrued due from the defendant to the plaintiff under the agreement in the declaration in this cause mentioned after the 29th of September, 1858; that the defendant, being under terms to plead issuably, pleaded to that action pleas which were not issuable (but not the defence now set up); and that the plaintiff thereupon signed judgment, and thereby recovered the rent sued for in that action:—

Held, that the replication was bad,—the defendant not being estopped by his omission to set it up on the former occasion, from availing himself of the defence alleged in his plea.

THE declaration stated that theretofore, to wit, on the 29th of September, 1853, it was agreed between the plaintiff and the defendant as follows, that is to say, the plaintiff, in consideration of the expense to be incurred in the buildings thereafter mentioned, and of the rent and covenants thereafter stipulated for, did agree to grant a lease or demise unto the defendant, his executors, administrators, and assigns (as thereafter mentioned), of a piece or plot of ground in the parish of Putney, part of two larger estates, one then lately known as the Cedars, and the other then lately occupied by the college of civil engineers, and therein \*more fully mentioned and referred to, To \*814] hold unto the defendant, his executors, &c., from the 29th of September then instant, for the term of ninety-nine years, at the rent of a peppercorn for the first year of the said term, and at the yearly rent of 7l. 10s. for the remainder of the said term, payable half-yearly, clear of all tithe rent-charges, taxes, sewers-rate, and all other rates, assessments, and deductions whatsoever; the first payment of rent to be made on the 25th of March, 1855, whether the lease should have been executed or not; but the said agreement should not be considered a lease: And the defendant thereby agreed that he should and would, on or before the 29th of September, 1855, at his expense build and

completely finish, fit for habitation, under the direction or with the approbation of the surveyor for the time being of the plaintiff, his heirs or assigns, one (and not more than one) messuage or dwelling-house in a substantial and workmanlike manner, of not less value than 700*l.*, with good and proper materials, of an uniform design with the adjoining houses, and according to the specification stated or referred to in the schedule to the said agreement; and that he the defendant should and would pay and contribute a proportionate share of the expense incurred or to be incurred in keeping in good repair all roads, foot-paths, drains, and sewers then made or thereafter to be made upon or for the use of the premises thereby agreed to be demised, in common with other property on the said estates then lately called the Cedars and college of civil engineers, and otherwise, under the covenants contained in a certain indenture dated the 12th of August, 1853, therein described, in exoneration of the plaintiff from the obligation of such covenants in the said indenture last mentioned contained: and also should and would at his expense, at or before the time of roofing in the \*same, insure [\*815 and keep insured the said messuage or dwelling-house, and all erections and buildings that should be erected and built on the ground thereby agreed to be demised, in the joint names of the defendant and the plaintiff, in such office or offices for insurance from fire as the plaintiff should nominate and approve, in a sum of 550*l.* at least, and produce the receipts for the premiums and duty to the plaintiff when required so to do: And the defendant did thereby declare that he was satisfied with the title of the plaintiff to the premises thereby agreed to be demised, and should not call for any evidence thereof, or make any objection thereto or inquiry thereon: And the plaintiff did thereby agree with the defendant, that when and so soon as the defendant should have roofed in the said messuage or dwelling-house so to be erected and built by him as aforesaid, then the plaintiff, his heirs and assigns, should and would demise to the defendant, his executors, &c., the said messuage or dwelling-house so to be erected and built, together with the plot or parcel of ground belonging thereto, for the term of years and at the yearly rent thereinbefore mentioned: And it was agreed that the said lease should contain all such covenants, clauses, and provisoes, as were usually inserted in metropolitan building-leases, and also all such of the conditions contained in the schedule to an indenture dated the 12th of August, 1853, as were applicable to the premises thereby agreed to be demised; and that such lease, with a counterpart, should be prepared by Messrs. H. & L. at the costs and charges of the said defendant: provided always, and it was thereby declared, that, if the rent should be in arrear for twenty-one days, and, being demanded before or after the twenty-one days, should not be paid when demanded, or if the said intended erections and buildings, or any of them, \*should not [\*816 be commenced within eighteen months from and after the day of the date of the said agreement, or, if commenced, should not be regularly proceeded with, after notice in writing to proceed therewith should have been given, or should not be completely built and finished within six calendar months after the said 29th of September, 1855, and after notice in writing to complete and finish the same should have been given as aforesaid, it should be lawful for the plaintiff to re-enter upon and take possession of the ground thereby agreed to be demised as to which

any such default should be made, and the building erected thereupon and to put an end to that agreement accordingly: Averment, that the said agreement was still in full force, and that the said lease had not been granted, and that the defendant had not yet become entitled to have the same granted, and that, before suit, a large sum of money, to wit, 150*l.*, of the rent aforesaid, became and was due and payable; yet, although before suit all things existed and had happened which it was necessary should exist and happen in order to entitle the plaintiff to payment by the defendant of the said rent, no part thereof had been paid.

Second plea, to the first count of the declaration,—that the said rent therein sought to be recovered was and is rent claimed by the plaintiff as having accrued due to him after the 29th of September, 1858, and the causes of action in that count mentioned respectively first accrued due after that day and not before; that, after the making of the agreement in the first count mentioned, and before the giving of the notice to quit thereafter mentioned, the defendant, with the privity and assent of the plaintiff, entered into and upon the said premises, with the appurtenances, and became and was possessed thereof as tenant thereof, to \*817] wit, \*as tenant at will thereof, to the plaintiff, and that afterwards, and before the giving of the said notice, and before the accruing of the causes of action therein pleaded to, the plaintiff and the defendant agreed together, that, by way of substitution for the defendant's interest in the said premises under the said agreement, the plaintiff should demise to the defendant the said premises, to have and to hold the same to the defendant from the day of the making of the said demise for one whole year then next following and fully to be complete and ended, and so on from year to year so long as the plaintiff and the defendant should respectively please, and on the terms of the said agreement as to the payment and time of payment of rent for the same and otherwise, so far as such terms were or could be consistent with the tenancy last aforesaid; and the said demise was accordingly made, and on the terms aforesaid, and the defendant's estate and interest thereunder became and were substituted for any relationship between the plaintiff and the defendant as to the enjoyment of the said premises and payment of rent for the same which theretofore had existed under and by virtue of the said agreement; and the said agreement, except as to the terms aforesaid which so became terms of the said demise, became and was rescinded by the plaintiff and the defendant respectively; and that, after the making of the said demise, and whilst the defendant was possessed of the said premises thereunder as such tenant as last aforesaid, and half a year next before the 29th of September, 1858, the said 29th of September, 1858, being the day of the expiration of the then current year of the said tenancy, the defendant gave due notice to the plaintiff that he the defendant would quit and deliver up to the plaintiff possession of the said premises on the said 29th of September then next \*818] \*following, and the defendant, on the said day, and before the suit, and before the accruing of the causes of action therein pleaded to, did quit and deliver up possession as aforesaid accordingly; whereby the said tenancy was ended and determined, and no rent ever became due or payable by the defendant to the plaintiff in respect of the said premises after the said 29th of September, 1858.

Replication to the second plea,—that the defendant ought not to be admitted to plead the said plea, because the plaintiff said, that, before this suit, he the plaintiff impleaded the defendant in an action against the defendant in this Court for the recovery of rent as having accrued due from the defendant to the plaintiff upon and by virtue of the agreement in the declaration in this cause mentioned, after the said 29th of September, 1858, and the plaintiff afterwards declared in the said action upon the said agreement; and such declaration was and is as follows [setting out the declaration]: That, afterwards, the defendant duly applied for time to plead to the same action, and the same was granted to him upon his undertaking to plead issuably to the said declaration; and afterwards the defendant pleaded to the said declaration only pleas which are as follows,—first, as to the sum in the declaration described to be payable as rent on the 25th of March, 1855, payment into Court of 3*l.* 15*s.*,—secondly, as to the remainder of the declaration, that no messuage or dwelling-house or building had ever been erected or built or roofed in upon the said premises, nor had any such dwelling-house or building ever been commenced; that, thereupon, the said pleas being non-issuable, and in breach of the said undertaking, the plaintiff treated the same as null and void, and duly signed judgment against the defendant in the said action as for want of a plea thereto; and the plaintiff thus recovered by the \*judgment of the said Court in the [\*819 said action the said rent in that action sued for; and that the defendant afterwards, having notice of all the premises, submitted to and acquiesced in the said judgment, and duly satisfied and discharged the plaintiff's claim thereunder; that the defence in the second plea in this action set forth and relied on, existed, if at all, before and at the time of the commencement of the said first-mentioned action, as the defendant then well knew; wherefore the plaintiff prayed judgment if the defendant ought now to be permitted to plead the said second plea in this action.

To this replication, the defendant demurred, the ground of demurrer stated in the margin being, “that the facts set forth in this said replication do not show any estoppel.” Joinder.

*Marshall*, in support of the demurrer.(a)—The plaintiff sues upon an agreement of the 29th of September, 1853. The defendant pleads, that, after the making of that agreement, it was agreed between the parties that a tenancy from year to year should be created in substitution for the former tenancy under the agreement, that notice to quit was duly given, and that no rent \*was due until after that tenancy [\*820 had ended. To this the plaintiff replies by way of estoppel, that he brought an action for rent accruing due under the agreement in the declaration mentioned after the day on which the defendant alleged the tenancy to have been determined, to which action the defendant did not

(a) The points marked for argument on the part of the defendant were as follows:—

“1. That the facts set forth and disclosed on the face of the replication do not show an estoppel to this action:

“2. That the replication, being by way of estoppel, must be certain in every particular, and that it is consistent therewith that the pleas to the former action were pleaded by inadvertence, and that the submission to the said judgment was compulsory and against the defendant's will and efforts to the contrary:

“3. That it is also consistent that the rent in the replication mentioned was the same as that now sued for, in which case the replication shows it to have been satisfied.”

set up the defence now urged, and that in that action the plaintiff obtained judgment as for want of a plea. It is submitted that this is a bad replication, and that the doctrine of estoppel does not apply to such a case. It has never yet been held that a defendant is concluded and estopped by a judgment by default in an action for former arrears. The whole doctrine is fully discussed in the notes to the *Duchess of Kingston's Case*, 2 Smith's Leading Cases, 4th edit. 610, where it is said that an estoppel does not operate conclusively "where the thing averred is consistent with the record." Now, here it is perfectly consistent with the record in the former action that there should be a good answer to a claim for subsequent arrears, and that the substitution of the tenancy from year to year for the original agreement may be true. So, "where the allegation in the record is uncertain; for, an estoppel, not being favoured by the law, ought to be certain to every intent: Co. Litt. 352 b, 353 a: and therefore, 'if a thing be not directly and precisely alleged, it shall be no estoppel:' Co. Litt. 352 b." It does not appear from the record in the former action at what date the rent accrued. "Or is not traversable or material: see *Attorney-General v. King*, 5 Price 195: and see Co. Litt. 352 b. As, for instance, the day in an indictment. On this principle, too, seems to have proceeded *Skipwith v. Green*, 1 Stra. 610, 8 Mod. 311, where the tenant was held not to be estopped by the description of the nature of the land in the lease." [WILLIAMS, J.—The next preceding \*paragraph is rather against your argument,—“The words used by Lord Coke are, ‘matters alleged by way of supposal in counts shall not conclude after nonsuit. Otherwise it is after judgment given. And, after nonsuit, albeit the supposal in the count shall not conclude, yet the barre, title, replication, or other pleading of either party which is precisely alleged shall conclude after nonsuit; and hereby are the books reconciled:’ Co. Litt. 352 b.” WILLES, J.—This which is called a “rent,” is a sum in gross. The original agreement was the ordinary building agreement: *The Marquis of Camden v. Batterbury*, 7 C. B. N. S. 864 (E. C. L. R. vol. 97).] In *Seddon v. Tutop*, 6 T. R. 607, the plaintiff in a former action declared on a promissory note, and for goods sold; but, upon executing a writ of inquiry after judgment by default, gave no evidence on the count for goods sold, and took his damages for the amount of the promissory note only: and it was held that the judgment thereupon was no bar to his recovering in a subsequent action for the goods sold. In *Godson v. Smith*, 2 J. B. Moore 157, in an action of assumpsit brought against an administratrix, she pleaded in abatement that others were jointly liable, which she failed to prove, in consequence of which the plaintiff recovered a verdict with 1s. damages; and it was held that such verdict did not amount to satisfaction, so as to estop the plaintiff from recovering against the other contractors. [WILLIAMS, J.—Suppose a defendant in an action for an instalment due on a bond, set up a release or coverture, and issue taken upon it, and found against the defendant, the doctrine of estoppel would prevent that defence being set up in an action for a second instalment. But, suppose the defendant neglected to set up the defence in the first action, would she be precluded from relying on it in the second action?] Clearly not. \*822] Estoppels \*by record rest upon the same ground as admissions; and admissions must be voluntary. A default is not to be treated

as an admission. A bad plea is no estoppel: *Lampen v. Kedgewin*, 1 Mod. 207. North, C. J., there says: "Suppose a declaration be faulty, and the defendant take no advantage of it, but pleads a plea in bar, and the plaintiff takes issue, and the right of the matter is found for the defendant,—I hold, that, in this case, the plaintiff shall never bring his action about again, for, he is estopped by the verdict: or, suppose such a plaintiff demur to the plea in bar, there, by his demurrer he confesseth the fact, if well pleaded, and this estops him as much as a verdict would; but, if the plea were not good, then there is no estoppel." Estoppels must be certain in every particular: this is not certain: there is no averment of the identity of the two causes of action. [WILLES, J.—Has it ever been held, that, where there has been a demurrer to the declaration, the defendant is estopped by his admission of the allegations in the declaration?] No. To constitute an estoppel, the point in dispute must be the same. In *Carter v. James*, 13 M. & W. 137,† where to an action of debt on an indenture whereby the defendant covenanted to pay 600*l.*, the defendant pleaded by way of estoppel a former action by the plaintiff upon a bond conditioned to secure the same sum, and that to a plea in that action alleging a usurious agreement and that the bond had been given in pursuance thereof, the plaintiff had replied, traversing that the bond was given in pursuance of the said agreement, which had been found against him, upon demurrer the plea was held bad, as the fact of a usurious agreement was not directly in issue in the former action, but only the question whether the bond had been given in pursuance of the agreement alleged in the plea. [BYLES, J.—What was the use of taking a material allegation with a protestando? Was \*it not to prevent the party's being estopped by an admission on the record?] It may be that the doctrine of estoppel was more [\*828 rigid when the pleadings were single. In *Barrs v. Jackson*, 1 Y. & Coll. C. C. 585,† Vice-Chancellor Knight Bruce lays down the principles which govern estoppels: and in the course of his elaborate judgment, says: "It is, I think, to be collected, that the rule against reagitating matter adjudicated is subject generally to this restriction, that, however essential the establishment of particular facts may be to the soundness of a judicial decision, however it may proceed on them as established, and however binding and conclusive the decision may as to its immediate and direct object be, those facts are not at all necessarily established conclusively between the parties, and that either may again litigate them for any other purpose as to which they may come in question; provided the immediate subject of the decision be not attempted to be withdrawn from its operation, so as to defeat its direct object. This limitation to the rule appears to me, generally speaking, to be consistent with reason and convenience, and not opposed to authority."

*Dowdeswell*, contrà.(a)—Where the plaintiff's right to bring the action

(a) The points marked for argument on the part of the plaintiff were as follows:—

"That, by the judgment recovered against him in the former action, the defendant is estopped from setting up the matter of defence contained in his second plea:

"That the validity of the declaration depends upon the existence or non-existence of the contract disclosed by it:

"That the intention of the second plea is, to show that such contract had been determined at a time prior to the action in the replication to that plea pleaded:

"That the defendant, by permitting judgment to pass against him under the circumstances mentioned in the replication, and by paying the rent claimed in the first action, admitted the

\*824] has been once solemnly confessed \*on record, the defendant is for ever estopped from denying it. This proposition is fully borne out by the authorities referred to in the learned notes to *The Duchess of Kingston's Case*. In *Ferrer's Case*, 6 Co. Rep. 7 a, "Between Ferrer and Arden these points were resolved: 1. When one is barred in any action real or personal by judgment or [on] demurrer, confession, verdict, &c., he is barred as to that or the like action of the like nature for the same thing for ever: for, *expedit reipublicæ ut sit finis litium*. But there is a difference between real actions and personal actions; for, in a personal action, as, debt, accompt, &c., the bar is perpetual, for the plaintiff cannot have an action of a higher nature, and therefore in such case he has no remedy but by error or attain. But, if the demandant be barred in a real action by judgment on a verdict, demurrer, confession, &c., yet he may have an action of a higher nature, and try the same right again, because it concerns his freehold and inheritance." The omission of the protestando here barred the defendant in any future action. [WILLIAMS, J.—The plea is not a denial of the agreement, but merely sets up a discharge by matter ex post facto: nor is it an omission to traverse a matter which was traversable.] The tenant in a recovery never could set up a claim contrary to the right he admitted on that occasion. In the case of *Outram v. Morewood*, 3 East 346,—where "the principles and authorities on which this part of the law of estoppel depends are stated with great force, learning, and clearness by the Lord Chief \*Justice,"—it is laid down, that, if a verdict be found on \*825] any fact or title distinctly put in issue in an action of trespass, such verdict may be pleaded by way of estoppel in another action between the same parties or their privies in respect of the same fact or title. One who submits to a distress is for ever afterwards estopped from denying that he was tenant of the premises at the time of such distress, or that the distrainer was his landlord. So, an executor who omits to plead plene administravit is estopped from denying the possession of assets. In *The Queen v. The Mayor, &c., of Sandwich*, 10 Q. B. 563, 571 (E. C. L. R. vol. 59), it was held that an assessment of compensation under the 5 & 6 W. 4, c. 76, to the prosecutor in respect of certain offices of profit which he had held under the old corporation, under a mandamus, was held to estop the corporation from denying in a subsequent proceeding in relation to the same matter that the prosecutor had held the offices in question. So, in *Todd v. Maxfield*, 6 B. & C. 105 (E. C. L. R. vol. 13), it was held, that, where a person who had become bankrupt was sued for a cause of action accruing before his bankruptcy, and pending the suit and before trial obtained his certificate, he must plead it puis darrien continuance; and, if he neglects to do so, and judgment is obtained against him, he cannot plead his certificate to an action on such judgment.

*Marshall* was heard in reply.

WILLIAMS, J.—I am of opinion that our judgment must be for the defendant upon this demurrer. Without adopting the old maxim that estoppels are odious, it is enough to say that the doctrine is not to be extended beyond what there is authority for. Now, I think it is quite

existence and validity to the contract after the period fixed by the second plea for its determination; and that such admission precludes his now contending that the agreement was so antecedently put an end to."

plain that there is no authority expressly in point to sustain the doctrine for which Mr. *\*Dowdeswell* has contended, viz., that, if there had been a previous action between the same parties founded [\*826 upon the same contract, and the defendant had suffered judgment by default in that action, he is precluded from setting up in a subsequent action any defence which he could have pleaded in bar to the former, notwithstanding the defence is in confession and avoidance of the agreement which is the foundation for the action. I think it is quite clear upon the authorities to which our attention has been called, and upon principle, that, if the defendant attempted to put upon the record a plea which was inconsistent with any traversable allegation in the former declaration, there would be an estoppel. But the defence set up here is quite consistent with every allegation in the former action. The plea admits the agreement, but shows by matter ex post facto that it is not binding upon the defendant.

WILLES, J.—I am of the same opinion. The alleged estoppel here comes within the exception stated in the note to *The Duchess of Kingston's Case*, viz., “where the thing averred is consistent with the record.” The defence is good, if true. It is quite consistent with the allegations on the record in the former action that this new matter is true. The defendant omitted to set it up on the former occasion: and the question is, whether, by allowing judgment to go by default, he is estopped as to that matter in every subsequent action at the suit of the plaintiff. It is an entirely novel proposition. I can well understand the propriety of the doctrine laid down by Lord Wensleydale in *Boileau v. Rutlin*, 2 Exch. 665, 681,†—“The facts actually decided by an issue in any suit cannot be again litigated between the same parties, and are evidence between them, and that conclusive, upon a different \*principle, [\*827 and for the purpose of terminating litigation; and so are the material facts alleged by one party, which are directly admitted by the opposite party, or indirectly admitted by taking a traverse on some other facts, but only if the traverse is found against the party making it. But the statements of a party in a declaration or plea, though, for the purposes of the cause, he is bound by those that are material, and the evidence must be confined to them upon an issue, ought not, it should seem, to be treated as confessions of the truths of the facts stated.” It is quite right that a defendant should be estopped from setting up in the same action a defence which he might have pleaded but has chosen to let the proper time go by. But nobody ever heard of a defendant being precluded from setting up a defence in a second action because he did not avail himself of the opportunity of setting it up in the first action. Mr. *Dowdeswell* has been unable to find an authority for such a proposition: and I have only found one case where it has been distinctly raised; but there it was raised by way of objection to a party pleading to a matter which he had confessed by demurring. It is to be found in *Rol. Abr. Estoppel* (D), pl. 14, *Vin. Abr. Estoppel* (D 2), pl. 14, and is as follows:—“If a prior prays in aid because he is presentable, and defendant says that he has covent and common seal, if he does not deny this, but demurs, by which he is ousted of the aid, he shall after be estopped to say in the same plea that he has not covent nor common seal, for this is confessed by nient dedire,”—referring to 11 H. 4, fo.

69. I think we should do wrong to favour the introduction of this new device into the law.

BYLES, J.—It is plain that there is no authority for saying that the defendant is precluded from setting up \*this defence. It was \*828] hard enough, in actions at common law, where the defendant could only plead one plea: but, to extend the rule to the case of an allegation not upon the record would increase the hardship tenfold. Suppose an action of covenant: the defendant had two defences,—performance and release: he could not plead both: he elected to plead performance. Suppose that plea found against him. He could not in a subsequent action plead non est factum. But, what authority is there for saying that he could not plead the release? Estoppels are not to be extended without authority.

KEATING, J.—I concur with my Lord and my learned Brothers in thinking there should in this case be judgment for the defendant. This is an attempt on the part of the plaintiff to extend the doctrine of estoppel far beyond what any of the authorities warrant.

Judgment for the defendant.

\*829] \*REW v. HUTCHINS and Others. May 4.

It is no objection to interrogatories under the 51st section of the Common Law Procedure Act, 1854, that they seek to obtain from the plaintiff admissions of conversations relating to the subject-matter of the action with a servant or agent of the defendants.

Interrogatories cross-examining the plaintiff upon the terms and conditions of various prior transactions between the same parties, and not connected directly with the contract sued upon, not allowed.

Nor as to the terms of any contract between the plaintiff and other persons.

Nor, in cross-examination of the plaintiff, to disprove a custom on which the defendant supposes the plaintiff will rely.

Interrogatories asking whether the plaintiff has had a correspondence relating to the subjects in dispute, and asking for the dates and names of the places and the correspondents, will be allowed.

THE defendants were sued as three of the directors of the Rhymney Iron Company. The particulars of the plaintiff's demand were as follows:—

“This action is brought to recover commission on the price of 20,000 tons of iron rails purchased of the Rhymney Iron Company (of which the defendants are directors and members) by Messrs. Girona, Brothers, of Barcelona, at 7*l.* per ton, and rails or other articles to the amount of about 2000 tons more, being necessary to or connected with the said 20,000 tons. The order or contract for such 20,000 tons was obtained or entered into, or the purchase thereof agreed on, in or about the months of May and November, 1859; and the plaintiff claims 2 per cent. on the whole price, which, reckoning the whole quantity at 22,000 tons, costing 154,000*l.*, amounts to 3080*l.*”

*Watkin Williams* moved for leave to deliver interrogatories to the plaintiff, under the 51st section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125.—The plaintiff is a merchant in London, and has acted as the agent in London of Girona, Brothers, of Barcelona; and, in that capacity, has for some years past been in the habit of giving orders on behalf of his principals to the Rhymney Iron Com

pany for iron rails and plant. In August, 1858, the plaintiff gave the Rhymney Iron Company a large order for iron for Girona, Brothers; and, upon the occasion of so doing, had interviews with Scudamore, the secretary of the Company. This contract was carried out; and, afterwards, Girona, Brothers, opened a communication directly with the defendants (the Rhymney \*Iron Company), requesting them to [\*830 quote a price for 20,000 tons of iron rails and other plant for the Saragoza Railway, and stating that they negotiated directly with the defendants in order to save the heavy commission they had to pay. This negotiation resulted in a contract. The plaintiff in no way intervened or took part in this transaction. The plaintiff claims from the defendants a commission upon this contract, upon the ground, it is supposed, that it resulted from his introduction or arose out of the contract of 1858, and that, by the custom and usage of brokers, he is entitled to a commission. The proposed interrogatories are divisible into several classes. The first is directed to show, that, in the earlier transactions, before 1858, the plaintiff was paid by Girona, Brothers, and did not act as middleman or broker, so as to entitle him to be paid a commission by the seller, according to the well-known usage in London. The second is directed to prove communications with the defendant's secretary as to the terms of the contract of 1858, and the fact of the plaintiff having been paid for his services by Girona, Brothers, and not by the defendants. The third is directed to show, that, upon other orders given by the plaintiff to the defendants for different parties, the plaintiff was not paid by the defendants. The fourth is directed to show that there is no usage or custom applicable to the plaintiff's claim. The fifth relates to inquiries whether the plaintiff has had a correspondence on the subject of the matters in dispute, and asking for the dates of the letters and the persons from and to whom, and the places to or from which, the correspondence passed, sufficiently to identify the letters, but without disclosing their contents. The sixth is addressed to subsequent conduct amounting to or being evidence of an admission by the plaintiff that he had no claim against the defendants. The seventh is addressed to inquiries \*as to a contract or arrangement between the plaintiff [\*831 and third parties relating to the subjects in dispute, inconsistent with the position now taken up by the plaintiff.

The proposed interrogatories were as follows,—omitting the words within brackets:—

- “1. Are you a merchant carrying on business in London?
- “2. Have you occasionally, for several years past, and as far back as 1852, or for what time, acted as mercantile agent in London, for the firm of Girona, Brothers, merchants of Barcelona?
- “3. *Previously to August, 1858, had you given orders to the Rhymney Iron Company, who are the defendants in this action, on behalf of the said Messrs. Girona, Brothers, for iron? and were you paid for your services in respect of those orders exclusively by Messrs. Girona, Brothers?*
- “4. In or about August, 1858, had you communications with Mr. Scudamore, the secretary of the Rhymney Iron Company, upon the subject of some iron rails required by Messrs. Girona, Brothers, of Barcelona? and had you a discussion or conversation with him respecting the price required by the Company?

"5. Did you, in the course of the said communications, state to the said Mr. Scudamore, or give him to understand, that you got 2 per cent. commission from Girona, Brothers, which would be an addition to the price to be paid by Girona, Brothers, *or anything, and, if so, what, upon the subject?*

"6. Did you, on or about the 30th of August, 1858, on behalf of Girona, Brothers, of Barcelona, effect a contract with the Rhymney Iron Company for the sale of iron rails and other iron articles?

"7. Were iron rails, tie-bars, saddles, and rivets, from time to time, and at many different times, shipped and forwarded under this contract from Newport and Cardiff to Girona, Brothers, at Barcelona?

\*832] "8. Were there not in the whole about 12,500 tons of iron at different times shipped in performance of the said contract? and did not such performance of the said contract extend over nearly twelve months?

"9. In the course of the performance of the said contract, had you occasion at different times to communicate with the Rhymney Iron Company respecting their performance of the said contract? and did you not in such communications act for and on behalf of the said Messrs. Girona, Brothers?

"10. *Were you in May, 1859, acting as agent in London of the Grenolles Gerona Railway Company?*

"11. *Did you on or about the 26th of May, 1859, effect a contract on behalf of the Grenolles Gerona Railway Company with the Rhymney Iron Company for iron rails?*

"12. *In that case were you not paid for your services exclusively by the said Grenolles Gerona Railway Company?*

"13. Did you in the course of November, 1859, *or otherwise*, have an interview with Mr. Scudamore, the secretary of the Rhymney Iron Company? and had you then a conversation with him respecting the contract for sale of the 20,000 tons of iron by the Company to Girona, Brothers, mentioned in the particulars of demand in this action?

"14. Did you upon that or any other *and what* occasion mention to Mr. Scudamore that you had heard that the Rhymney Iron Company had sold 20,000 tons of iron to Girona, Brothers, direct, and that you could hardly believe it, or words to that effect, *or otherwise? and, if so, what upon the subject?*

"15. Did you also say to Mr. Scudamore, that of course the Company had protected you in the way of commission, or to that effect? and did he not answer that they had not done so, or to that effect? \*833] *and was that all that passed on that occasion? If not, what else passed?*

"16. Previously to the above-mentioned interview, had you any communication with the Rhymney Iron Company [or with any one on their behalf] upon the subject of the sale by them of the said iron or the contract for 20,000 tons of iron mentioned in the particulars of demand? *If so, state when, with whom, and to what effect.*

"17. Beyond the 12,500 tons of iron supplied by the Rhymney Iron Company to Messrs. Girona, Brothers, under the contract of the 30th of August, 1858, as before inquired after, had you after the date of the last-mentioned contract, and before the date of the contract for 20,000 tons mentioned in the particulars of demand, any communications with

the Rhymney Iron Company respecting the supply by the Company to Messrs. Girona, Brothers, of any further iron? *And, if you say yes, state when, with whom, and to what effect.*

"18. Had you any personal communications with Messrs. Girona, Brothers, upon the subject of the contract for the purchase by them of the 20,000 tons of iron from the Rhymney Iron Company, mentioned in the particulars of demand [relating to your remuneration or commission upon that sale]? And, if so, state when, and to what effect.

"19. Had you another interview with Mr. Scudamore on a subsequent occasion to that above referred to in interrogatory 18, upon the subject of the said sale of 20,000 tons of iron? And did you then say that you felt quite sure that the Company must have provided for you? And did you then produce an account of your claim for commission? and did Mr. Scudamore then say that you must know you had no claim against the Company, that Messrs. Girona had \*come direct to [\*834 the Company, and that they had done so in order to save the commission which they would have had to pay? and did he advise you to withdraw that account and claim, or to the above effect? *or, if not, what do you say passed?*

"20. Did you upon the occasion last mentioned take your said account back with you? and did you afterwards address a letter on the subject to the said Company, dated the 29th of November, 1859?

"21. *Do you know of any instance of a London merchant acting as a mercantile agent for a foreign house, successfully claiming commission from other merchants, to whom he had given orders, or with whom he had effected contracts on behalf of his foreign principal, except where there had been a bargain or promise to pay such commission? If yes, state what instances you know of.*

"22. *Have you ever known any instance in which either a broker or merchant has successfully claimed commission in respect of a contract, where he had originally introduced the parties to one another upon a former contract, but without having taken any part in or in any way been engaged in the initiation or negotiation of or bargaining for the subsequent contract upon which he claims the commission, except where there has been a bargain or promise to pay such commission? If so, state any instances.*

"23. Has any correspondence or communication passed between you and Messrs. Girona, Brothers, of Barcelona, or with any one on their behalf, either by letters or telegrams upon the subject of your *undertaking the transaction of business for them in this country, and in particular as to the giving orders or effecting contracts by you for them for the purchase of iron, and as to the mode of remuneration to you for such services, or upon the subject of the contracts effected \*by* [\*835 *them through you with the Rhymney Iron Company, or upon the subject of the contract for 20,000 tons of iron mentioned in the particulars of demand* [which would be applicable to the relation in which you stood with them in the years 1858 and 1859 upon the above subjects]? And, if so, state the respective dates of the same, and by and to whom *the same were sent*, and [to or] from what places [the same were sent, sufficiently to identify them].

"24. Was there at any time any written contract between you and the said Messrs. Girona upon the subject mentioned in the first part of

*the last interrogatory* [upon the subject of the last interrogatory and extending to the same period]? If so, state when, and who the parties to the same were, and where the same now is.

"25. Have you since the date of the contract for 20,000 tons of iron mentioned in the particulars of demand given the Rhymney Iron Company an order for a large quantity of iron for the said Messrs. Girona, Brothers? And was not the said order accepted and executed? And, were you not remunerated exclusively by Messrs. Girona, Brothers, for your services in this transaction? And, is it not true that nothing was ever said by you to, nor any claim made upon, the Rhymney Iron Company for commission or other remuneration?

"26. Was it not agreed or understood between you and Messrs. Girona, Brothers, that you were to receive no commission or remuneration from the parties with whom you dealt on their account, and that you were to look to them, Messrs. Girona, Brothers, for your remuneration or commission?"

[ERLE, C. J.—Have you a right to ask for the correspondence? Is it not obtaining the contents of \*written documents?] No. We \*836] do not ask for the contents; only the dates and the places and the names of the correspondents: and we only refer to the subject of the letters sufficiently to identify and point to them. The answers will not show what is written upon the subject referred to; only that there was something written upon the subject: and this is not within the rule which excludes evidence as to the contents of writings. [WILLES, J.—Ought not the application for discovery of documents to be made by summons under the 50th section, which relates expressly to the subject?] The discovery under that section is far wider than these interrogatories: it relates to a discovery of all documents relating to the matters in dispute; and discovery by way of interrogatory as to any particular document or class of documents, is in some cases necessary, where the party is not in a condition to support a summons for general discovery of documents under the 50th section, as it is necessary to support such summons by a distinct affidavit that the opposite party has in his possession or power some particular document to the production of which the applicant is entitled, and an interrogatory is admissible in order to give the party putting it the necessary information to enable him to make the affidavit in support of the summons for general discovery. No doubt, an interrogatory extending to such a general discovery of documents as that granted under the 50th section would practically be an evasion of the statute, which does not (in s. 51) require the same affidavit in support of interrogatories as in support of such discovery. But, in the present case, it is submitted, the information required is a proper subject for an interrogatory.

*Rew* showed cause in the first instance.—The proposed interrogatories are objectionable individually, as \*well as on principle. \*837] They seek to rake up all the correspondence and dealings between the plaintiff and Girona, Brothers, for the last nine years. [WILLES, J.—In *Hollingham v. Head*, 4 C. B. N. S. 388 (E. C. L. R. vol. 93), this Court held that it was not competent to the defendant in an action for goods sold and delivered,—the question being whether the sale was absolute or subject to a condition,—to call witnesses to prove

that the plaintiff had made contracts with other persons subject to the condition suggested. **ERLE, C. J.**—Do you object to be interrogated as to the contracts of 1858 and 1859? For the sake of peace, the plaintiff would consent to answer those: but all that has reference to earlier transactions should be excluded. Then, the questions as to alleged conversations with Scudamore, the agent or servant of the defendants, are clearly objectionable. If these are matters in dispute, Scudamore may be called as a witness. In *Bird v. Malzy*, 1 C. B. N. S. 308 (E. C. L. R. vol. 87), this Court refused to allow interrogatories for the purpose of obtaining from the plaintiff information which the defendant has the means of obtaining from his own agents. [**ERLE, C. J.**—No general principle was laid down in that case. I think the conversations with Scudamore may be allowed, limited to the transactions of 1858 and 1859. **WILLIAMS, J.**—And striking out the general words.] The 21st interrogatory is clearly improper. [**ERLE, C. J.**—I think it is.]

**PER CURIAM.**—With the intimations we have thrown out, the Judge at Chambers will be able to settle the interrogatories between the parties.

The interrogatories were afterwards settled before Keating, J., at Chambers, by striking out the parts printed above in italics, and adding the words within brackets.

### \*ZYCHLINSKI v. MALTBY, Clerk, and Another. June 12. [\*888

The Court will allow any interrogatories to be administered under the 51st section of the Common Law Procedure Act, 1854, which are relevant to the matter in issue, and which the party interrogated would be bound to answer if in the witness-box.

THIS was an action for a malicious prosecution of the plaintiff by the defendants upon a charge of having obtained a sum of 400*l.* from the defendant Maltby by false and fraudulent pretences. The alleged false pretences consisted of representations made by the plaintiff that he had disbursed sums to that amount for Mr. Maltby's wife and daughters at Rome and at Paris.

*Merewether*, for the defendants, moved for leave to interrogate the plaintiff under the 51st section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, as to certain circumstances upon which the defendants intended to rely as grounds of reasonable and probable cause for the prosecution. The proposed interrogatories were as follows:—

“1. Did you, in or about the month of March, 1860, at Rome, become acquainted with Mrs. Maltby, the wife of the above-named defendant, the Rev. H. Maltby, and his two daughters?

“2. Did you at any time, and when, at Rome, receive from the said Mrs. Maltby the sum of 1000 Roman scudi, or some other and what sum? and, if yea, for what purpose or purposes did you receive such money?

“3. Did you at the time when you received such money from her, or at

any other time, know that Cardinal Antonelli had lent her a sum of 1000 scudi, or some other and what sum?

"4. Did you receive such money from her for the purpose of paying for her or on her accounts debts contracted or owing by her at Rome?

\*839] "5. Did you pay any and what sum or sums of money at Rome, for or on account of the said Mrs. Maltby? and, if so, state particularly all the sums which you so paid, and to whom respectively, and when.

"6. Did you at any time, and when, pay a sum of 152 scudi, or some other and what sum, for or on account of the said Mrs. Maltby, to the Brothers Spillman, confectioners at Rome?

"7. How much money in all did you pay for or on account of the said Mrs. Maltby at Rome? and, if on any other account than in payment of the debts specified by you in answer to the fifth interrogatory, on what account or accounts, and to what amount, and in what sums, and to whom paid?

"8. Did you receive at Rome from the said Mrs. Maltby and her daughters, or from any or either of them, a sum of 340 francs or thereabouts for the purpose of the same being deposited by you on their account or the account of any of them in the Monte di Pietà or some bank at Rome? If yea, did you so deposit the said sum? and, if so, in what name did you so deposit it? and, if you did not so deposit it, what did you do with such money?

"9. Did you receive from or on account of the said Mrs. Maltby, at Paris, in or about July 1860, the following sums, or any and which of them,—viz., the sum of 15*l.* from Mr. Massey, 17*l.* from the proceeds of the sale of some jewellery, 25*l.* from Mr. Maltby, 7*l.* from Mrs. Maltby, and, in September, 1860, 60*l.* from Mrs. Maltby, or some other and what sum or sums from the said persons respectively, or any and which of them?

"10. Did you make any and what payment or payments for or on account of the said Mrs. Maltby at Paris, or on the journey from Rome to Paris, or on the journey from Paris to England? And, if so, state \*840] particularly the sum or sums you so paid, and on what account, and when.

"11. Did you at any time and when, in 1860 or 1861, remit from Paris to one Koll, a banker at Rome, or to any other and what person at Rome, a sum of 4000 francs, or any other and what sum, for the purpose of paying debts contracted and owing by the said Mrs. Maltby at Rome?

"12. Were you ever, and when, a captain in the cavalry guards, or the guards, of Alexander the Second, Emperor of Russia? And, did you ever hold any and what rank or ever serve in the Russian army? And, did you ever represent to Mrs. Maltby and her daughters, or any of them, that you had been or were a captain in the cavalry guards, or the guards, of the said Emperor of Russia?

"13. Are you, and when did you become, a knight or chevalier of any and what order or orders? And, did you ever represent to Mrs. Maltby and her daughters, or any of them, that you were a knight or chevalier of any order or orders?

"14. Did you ever serve in the Russian army, or in any other and

what army, in the Crimea, during the siege of Sebastopol? And were you wounded whilst in the Crimea? And did you ever make any representation or representations to that or the like effect to Mrs. Maltby, and her daughters, or any of them?

"15. Did you ever, and when, serve in the Prussian army as a volunteer or otherwise? and when and for what reason and under what circumstances did you leave such army? Were you not, and were you not adjudged to be, a deserter from the Prussian army?

"16. Had you on or about the 18th of September, 1860, an interview at Nottingham with the defendants and others? and did you on that occasion bring a person with you who acted as interpreter between you and \*the defendants, or between you and the defendant H. B. Campbell on that occasion? Was that person then in your [\*841 employ or service as your secretary or otherwise? and is he so still? Or, if not, when did he cease to be your secretary or servant? What is his name, and where is he now, and when last did you see him, and when last did you hear from or of him, and where was he when you last saw him and last heard from or of him?

"17. Was the said person with you in the Crimea during the siege of Sebastopol? and, had his father been secretary to your father? and, did you authorize the said person to make, or did he with your knowledge and consent make, a representation to that effect at the said interview at Nottingham?

"18. Did you at that interview state or represent that you had advanced to and for Mrs. Maltby moneys to the value or amount of 400*l.* or thereabouts?

"19. *Did you, in or about the Spring of 1860, or at some other and what time before leaving Rome, receive from or on account of the said Mrs. Maltby a box of plate, for the purpose of the same being delivered to and left in the care of Mr. Shea, or for some other and what purpose? Or, had you anything and what to do with the said box of plate? And, was the same ever delivered to Mr. Shea? And, who was Mr. Shea, and what office did he hold at Rome?*

"20. *Was this box of plate pledged at the Monte di Pietà at Rome for any and what sum, and by whom and on whose account was the same pledged, and who received the money for which it was pledged?*

"21. *Did you at any time, and when, authorize the said Mr. Shea to sell the said box of plate? And, did you or any person on your account or behalf receive from the said Mr. Shea, or from any other person or persons, any and what sum or sums of money, or draft \*or [\*842 drafts or other security or securities for money, as for or on account of the proceeds of the sale of the said box of plate? Were not the same remitted to your agent, Mr. Simpson, of Paris, and paid over to you? And, did not some, and what, proceeds of the said sale, come to your hands?"*

The learned counsel submitted that the defendant had a right to put such questions to the plaintiff by way of interrogatory as he would be compellable to answer if in the witness-box; that it was material for the defendants to show that the plaintiff had received moneys from Mrs. Maltby, and from other persons on her account, for the purpose of paying the debts which he alleged he had paid at Rome and in Paris, and also to show under what circumstances he had introduced himself to the

wife and daughters of the defendant Maltby; and that all the interrogatories were relevant, as forming part of the history of his transactions with them. He referred to *Chester v. Wortley*, 17 C. B. 410 (E. C. L. R. vol. 84).

*A. Wills* showed cause in the first instance.—The object of these interrogatories is, not so much to found the defence to the action as to prevent the necessity of the defendants' putting Mrs. Maltby into the witness-box. Many of them are manifestly irrelevant: the inquiries as to the plaintiff's military service, for instance, can have no possible reference to the alleged false pretences. Then, the questions as to the box of plate and the money suggested to have been raised upon it at the Monte di Pieta at Rome, are still more remote from the matter in hand. In *Tupling v. Ward*, 6 Hurlst. & N. 749,† in an action for a libel imputing an offence to the plaintiff, the Court refused to allow him to administer interrogatories directed to extract from the defendant \*843] whether he was the author or \*publisher of the alleged libel. The Court there say, that, in the exercise of the discretion given them by the statute, they did not think it fair to submit to the defendant questions which he clearly was not bound to answer, merely for the purpose of creating a prejudice against him from his refusal to answer them.

ERLE, C. J.—I see no objection to any of these interrogatories except those which relate to the box of plate. These do not seem to me to be at all relevant: but all the rest, I think, may be allowed to stand.

*Merewether* agreed to abandon the questions printed above in italics.

PER CURIAM.

Rule absolute.(a)

(a) See *May v. Hawkins*, 11 Exch. 610,† and the cases collected in *Day's Common Law Procedure Acts*, pp. 226 et seq.

### \*844] \*BANNERMAN v. WHITE and Others. June 12.

Upon a treaty for the sale of hops (by sample), the proposed buyer asked the seller if any sulphur had been used in the growth or treatment of them, adding that he would not ask the price if sulphur had been used. The seller thereupon asserted that no sulphur had been used. After the hops had been inspected, weighed, and delivered, the buyer discovered that sulphur had been used in the cultivation of a portion of the hops,—5 acres out of 300. The whole growth, however, was so mixed up together that it was impossible to separate the sulphured from the unsulphured hops.

The jury having found that the representation had been made, and was false (but without fraud), and that the buyer had entered into the contract entirely on the faith of that representation:—Held, that the representation amounted to a condition, and therefore that the buyer was entitled to repudiate the contract.

THIS was an action brought to recover the sum of 8350*l.* 16*s.*, being a moiety of the price of certain hops sold and delivered by the plaintiff to the defendants.

The defendants pleaded,—first, that the defendants were induced to buy by the false and fraudulent representation of the plaintiff at the time of the sale that no sulphur had been used in the growth of the hops,—secondly, that they did not promise as alleged.

The cause was tried before Erle, C. J., at the last Spring Assizes at Maidstone, when the following facts appeared in evidence:—The plain-

tiff is a well-known hop-grower in the county of Kent; the defendants are hop merchants in London. A few years ago, sulphur had been used to a great extent in the cultivation of hops; and in 1854 the Burton brewers, becoming impressed with a notion that the quality of their beer had become thereby deteriorated, refused to buy any more hops which had been so treated. The hop merchants thereupon sent a circular round to the growers, giving them notice of this objection, and stating that they would not in future purchase any hops without a guarantee that no sulphur had been applied to them. With a knowledge of this fact, the plaintiff, in October, 1860, offered the defendants his growth of that year,—the defendants having been the purchasers of that of the preceding year. Samples were produced in the usual way at the factor's in London, and, before the price was mentioned, the defendants inquired of the plaintiff if any sulphur had \*been used in the treatment of the hops that year. To this the plaintiff, according [\*845 to the evidence of the defendants' witnesses, answered "No;" and the defendant White added that he would not even ask the price if any sulphur had been used. The evidence of the plaintiff's witnesses upon this point was, that the plaintiff, when asked if any sulphur had been used, said that "there was no mould this year, and therefore no occasion to use any sulphur:" but they did not recollect hearing the defendant White say that he would not ask the price if any sulphur had been used. The parties then proceeded to discuss the price; and ultimately the defendants agreed to buy the hops, the price to be paid, one-half on the first of February, the other on the 1st of March following.

At the time of the purchase, the plaintiff gave the defendants the following guarantee:—"I hereby guaranty Messrs. Wigan, White & Wigans against any loss by my 1860 hops through the mode of treatment on the poles or curing, and hold myself liable to pay them any damage caused them thereby."

The hops, which corresponded with the samples, were accordingly sent to the defendants' warehouse on the 24th of October, and were weighed on the 26th in the presence of the seller and of the buyers,—the amount agreed to between them being 16,701*l.* 12*s.*

The defendants, having subsequently discovered that sulphur had been applied to a portion of the hops, wrote to the plaintiff on the 4th of December repudiating the contract. It was proved that sulphur had been used to about five acres of the hops, the whole growth being three hundred acres, and that the whole of the hops, both sulphured and unsulphured, had been mixed together. It appeared that the plaintiff, having purchased a new machine called a sulphurater, had been desirous of trying it, and so had used a small \*portion of sulphur to the five acres whilst the hops were under cultivation. This circum- [\*846 stance he had forgotten, or had thought unimportant when discussing the terms of the contract with the defendants.

On the part of the defendants, it was submitted that the absence of the use of sulphur was expressly made by them a condition of their entering into the contract.

For the plaintiff, it was insisted that the affirmation that no sulphur had been used was no part of the contract, but a mere representation, not wilfully false, and not amounting to a warranty; and that, the con-

tract being for the purchase of a specific article, in the absence of a warranty or fraud, the buyers were bound.

Two questions were left to the jury,—first, whether the plaintiff had wilfully made a false representation at the time of the contract, that no sulphur had been used,—secondly, whether the affirmation that no sulphur had been used in the growth of the hops was understood and intended by the parties to be a part of the contract, and a warranty to that effect.

The jury answered the first question in the negative, and the second in the affirmative: and they assessed the deterioration in market value of the hops by reason of the use of the sulphur at 4000*l*.

The learned Judge thereupon directed a verdict to be entered for the defendants, reserving leave to the plaintiff to move to enter it for him for 6350*l*. 16*s*. if the Court should be of opinion that the representation above mentioned was no part of the contract.

*Lush*, Q. C., in Easter Term last, obtained a rule nisi accordingly, on the ground that the stipulation that no sulphur had been used in the growth of the hops did not amount to a condition that the hops \*847] might be rejected if sulphur had been used. He referred to *Street v. Blay*, 2 B. & Ad. 456 (E. C. L. R. vol. 22), and the notes to *Cutter v. Powell*, 2 Smith's Leading Cases, 4th edit., 23. He also submitted, that it was too late to repudiate the contract after the property in the hops had passed to the defendants; and that, at all events, the defendants were not warranted in keeping the hops so long as they did before taking the objection. [ERLE, C. J.—If the question had been put to the jury, they would have found that the repudiation was within a reasonable time.]

*Bovill*, Q. C., *Hawkins*, Q. C., and *Kay*, in Trinity Term, showed cause.—It being a condition of the contract that the hops had not in any way been treated with sulphur, the defendants were justified, when they discovered that the article delivered to them was not that which they had agreed to buy, in declining to keep it. What the defendants contracted to buy was a parcel of unsulphured hops: that which was delivered was an article with which the defendants expressly declined to deal. The authorities upon the subject are distinct and clear. In *Young v. Cole*, 3 N. C. 724 (E. C. L. R. vol. 32), 4 Scott 489, the defendant placed in the hands of the plaintiff certain instruments called Guatemala bonds. The plaintiff sold them to one B., who paid him the market price, which he handed over to the defendant. A few days after the sale, B. returned the bonds to the plaintiff, he having discovered that they would not be recognised by the government by whom they purported to have been issued, by reason of their not being stamped. The plaintiff thereupon refunded to B. the sum B. had paid for them. It appeared that Guatemala bonds on the Stock Exchange were understood to mean bonds duly stamped, and that unstamped bonds were \*848] utterly worthless. It further appeared that a stock-broker dealing in foreign stocks is treated with as a principal. It was held, that, under these circumstances, the plaintiff was entitled to recover against the defendant as for money paid to his use the amount repaid by the former to B. Tindal, C. J., there says: "The money the plaintiff delivered to the defendant was his own money, he having sold the bonds as a principal to Bryant, and being subject to all the responsibili-

ties of a principal. That money was delivered upon the faith and understanding that the bonds the plaintiff had received from the defendant were genuine and available Guatemala bonds, and saleable on the Stock Exchange. It seems, therefore, that the consideration on which the money was paid has failed as completely as if the defendant had contracted to sell foreign gold coin, and had handed over counters instead. This is not a case of warranty: but the question is, whether the defendant has not delivered something which, though resembling the article contracted to be sold, is of no value. I am of opinion that he has." There, both parties were ignorant, at the time of the contract, that a stamp was necessary, which makes the case much stronger than the present. In *Dawson v. Collis*, 10 C. B. 523, 530 (E. C. L. R. vol. 70), Williams, J., refers to that case as taking the distinction (upon which the defendants rely here) between a warranty and a condition. *Young v. Cole* is again referred to in *Gompertz v. Bartlett*, 2 Ellis & B. 849 (E. C. L. R. vol. 75). There, an unstamped bill of exchange, endorsed in blank, purporting to be a foreign bill, was sold (without recourse) by the holder, who was not a party to the bill. It proved to have been drawn in this country, and was therefore unavailable for want of a stamp, and could not be enforced against the parties. The vendor and purchaser at the time of the sale were both alike ignorant of this defect. It \*was held that the purchaser was entitled to recover back the price from the vendor, *on the ground that the article sold as a* [\*849 *foreign bill did not answer the description by which it was sold*,—though it would have been otherwise (the sale being without any warranty, and there being no fraud), had the latent defect been one consistent with the article being a foreign bill. Lord Campbell says: "*Young v. Cole* is indeed a very strong case; for, the things there sold as Guatemala bonds were in one sense of the words Guatemala bonds; but they were not what was professed to be sold, viz., bonds binding on the Guatemala government. The case is precisely as if a bar was sold as gold, but was in fact brass, the vendor being innocent. In such a case, the purchaser may recover." In *Gardiner v. Gray*, 4 Campb. 144, it was ruled by Lord Ellenborough, that, where before or at the time of sale a specimen of the goods is exhibited to the buyer, if there be a written contract which merely describes the goods as of a particular denomination, this is not a sale by sample; but there is an implied warranty that the goods shall be of a merchantable quality of the denomination mentioned in the contract. In his summing up, his Lordship said: "This was not a sale by sample. The sample was not produced as a warranty that the bulk corresponded with it, but to enable the purchaser to form a reasonable judgment of the commodity. I am of opinion, however, that, under such circumstances, the purchaser has a right to expect a saleable article answering the description in the contract. Without any particular warranty, this is an implied term in every such contract." So, here, the defendants had a right to expect hops which had not been sulphured. In the well-known case of *Bridge v. Wain*, 1 Stark. N. P. C. 504 (E. C. L. R. vol. 2), goods sold were described in the invoice as "scarlet cuttings," and it \*was held that a warranty was to be inferred [\*850 that the goods answered the known mercantile description of scarlet cuttings. A warranty is not the less a warranty because it is a condition. [WILLIAMS, J.—In marine insurances, a warranty is also a

condition. WILLES, J.—So, in the case of a charter-party, in which the vessel was represented to be “now at sea, having sailed three weeks ago:” *Ollive v. Booker*, 1 Exch. 416, 423,† per Parke, B.] So, in the case of life insurance: *Anderson v. Fitzgerald*, 4 House of Lords Cases 484. The test is, as Parke, B., says in *Ollive v. Booker*, whether the untruth of the representation goes to defeat the whole object of the contract. In *Nichol v. Godts*, 10 Exch. 191,† it was held that an agreement for the sale and delivery of oil described as “foreign refined rape oil warranted only equal to samples,” is not complied with by the tender of oil which is not “foreign refined rape oil,” although it be equal to the quality of the samples. “The warranty,” says Parke, B., “affects only the quality, but not the nature of the article itself.” A warranty is a collateral undertaking that the thing sold shall be of a particular quality or description, not part of the substance of the contract itself, as the representation here was. [BYLES, J.—Would not the argument apply to the sale of a horse? No man wants to buy an unsound horse.] The case of a horse depends upon a different consideration: it is not like the sale of a manufactured article. That distinction is taken in *Jones v. Bright*, 5 Bingham 533 (E. C. L. R. vol. 15), 3 M. & P. 155, *Brown v. Edgington*, 2 M. & G. 279 (E. C. L. R. vol. 40), 2 Scott N. R. 496, and *Shepherd v. Pybus*, 4 Scott N. R. 434, 3 M. & G. 868 (E. C. L. R. vol. 42). In *Chanter v. Hopkins*, 4 M. & W. 399, 404,† Lord Abinger says: “A good deal of confusion has arisen in many of the cases on this subject, from the unfortunate use made of the word ‘warranty.’”

\*851] Two \*things have been confounded together. A warranty is an express or implied statement of something which the party undertakes shall be part of a contract; and, though part of the contract, yet collateral to the express object of it. But, in many of the cases, some of which have been referred to, the circumstance of a party selling a particular thing by its proper description has been called a warranty, and the breach of such contract a breach of warranty: but it would be better to distinguish such cases as a non-compliance with a contract which a party has engaged to fulfil; as, if a man offers to buy *peas* of another, and he sends him *beans*, he does not perform his contract; but that is not a warranty: there is no *warranty* that he should sell him *peas*; the contract is to sell *peas*, and, if he sends him anything else in their stead, it is a non-performance of it.” That is precisely this case. In *Flight v. Booth*, 1 N. C. 370 (E. C. L. R. vol. 27), 1 Scott 190, the particulars of sale of certain leasehold property in Covent Garden stated, that, under the original lease, “no offensive trade was to be carried on, and that the premises could not be let to a coffee-house keeper or working hatter.” The original lease, when produced, appeared to prohibit the businesses of brewer, baker, sugar-baker, vintner, victualler, butcher, tripe-seller, poulterer, cheese-seller, *fruiterer*, *herb-seller*, coffee-house keeper, working hatter, and many others, and the sale of coals, *potatoes*, or any provisions: and it was held that there was such a material discrepancy between the particulars and the lease as to entitle the purchaser to rescind his contract. In giving judgment, Tindal, C. J., says: “We think it is a safe rule to adopt, that, where the misdirection, though not proceeding from fraud, is in a material and substantial point, so far affecting the subject-matter of the contract that it may reasonably be supposed, that, but for such misdescription, the

purchaser might never have entered \*into the contract at all, in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation. Under such a state of facts, the purchaser may be considered as not having purchased the thing which was really the subject of the sale; as in *Jones v. Edney*, 3 Campb. 285, where the subject-matter of the sale was described to be a 'free public-house,' while the lease contained a proviso that the lessee and his assigns should take all their beer from a particular brewery; in which case the misdescription was held to be fatal." [WILLIAMS, J.—In the case of a sale of a lease nothing passes until the conveyance is executed; the objection comes by way of excuse for not completing.] The correspondence with sample and the absence of the application of sulphur in the cultivation of the hops, were both conditions. In *Street v. Blay*, 2 B. & Ad. 456, the contract was for a specific chattel. *Poulton v. Lattimore*, 9 B. & C. 259 (E. C. L. R. vol. 17), 4 M. & R. 208, *Toulmin v. Hedley*, 2 Car. & K. 157 (E. C. L. R. vol. 61), *Lucy v. Mouffet*, 5 Hurlst. & N. 229,† and *Hopkins v. Tanqueray*, 15 C. B. 130 (E. C. L. R. vol. 80), were also referred to.

*Lush*, Q. C., and *Hannen*, in support of the rule.—In the case of a sale of a specific chattel, where the property has passed, the buyer cannot afterwards repudiate the contract on the ground that the article does not correspond with the representation or warranty. Here, the defendants bought all the plaintiff's hops of the growth of 1860, consisting of 549 pockets, by a sample drawn from each pocket. The seller could only perform that contract by delivering the very hops that were grown upon his land. And the moment they were inspected, weighed, and delivered, the property in them passed to the buyers. The rule upon this subject is clearly and accurately stated in the notes to *Cutter v. Powell*, 2 Smith's Leading Cases, 4th edit. 22, \*23,—“It is settled by *Street v. Blay*, 2 B. & Ad. 456 (E. C. L. R. vol. 22), and *Poulton v. Lattimore*, 9 B. & C. 249 (E. C. L. R. vol. 17), 4 M. & R. 208, that, where an article is warranted, and the warranty is not complied with, the vendee has three courses, any one of which he may pursue. 1. He may refuse to receive the article at all: the power to pursue the first course, however, not extending to cases where there has been a warranty upon the sale of a *specific chattel*, and where, the property passing by the contract, it is not competent to the vendee to rescind it without the consent of the vendor, or a stipulation to that effect. See the observations of the Judges in the case of *Dawson v. Collis*, 10 C. B. 523 (E. C. L. R. vol. 70); also *Parsons v. Sexton*, 4 C. B. 899 (E. C. L. R. vol. 56). 2. He may receive it, and bring a cross-action for the breach of the warranty. Or, 3. He may, without bringing a cross-action, use the breach of warranty in reduction of the damages, in an action brought by the vendor for the price; i. e., to the extent of the difference between the agreed price or alleged value and the real value at the time of delivery as reduced by the breach of contract: but, if there be any further damage besides that so allowed in abatement of the price, he must bring a cross-action: *Mondel v. Steel*, 8 M. & W. 858:† and see *Rigge v. Burbidge*, 15 M. & W. 598.† It was once thought, and indeed laid down by Lord Eldon in *Curtis v. Hannay*, 3 Esp. N. P. C. 82, that the vendee might, on discovering the breach of warranty, rescind the contract, return the chattel, and, if he

had paid the price, recover it back. This doctrine, which was opposed to *Weston v. Downes*, Dougl. 23, is, however, overruled by *Street v. Blay* and *Gompertz v. Denton*, 1 C. & M. 207,† 3 Tyrwh. 282; and it is clear, that, though the non-compliance with the warranty may justify him in refusing to receive the chattel, it will not justify him in returning it, and suing to recover back the price; unless, \*indeed, he \*854] return it, having kept it (as he had a right to do, see *Lorymer v. Smith*, 1 B. & C. 1 (E. C. L. R. vol. 8), 2 D. & R. 23 (E. C. L. R. vol. 16)) such a time only as was necessary for a fair examination, in which case he cannot be considered as having received it at all: see *Okell v. Smith*, 1 Stark. N. P. C. 107 (E. C. L. R. vol. 2); *Jordan v. Norton*, 4 M. & W. 155;† *Street v. Blay*, 2 B. & Ad. 456 (E. C. L. R. vol. 22); *Young v. Cole*, 3 N. C. 724 (E. C. L. R. vol. 82), 4 Scott 489, where a distinction was drawn between the effect of a breach of warranty and that of a total failure of consideration. And probably the distinction between a *condition* and a *warranty*, as pointed out by Williams, J., in *Dawson v. Collis*, 10 C. B. 530 (E. C. L. R. vol. 70), will be found to obviate any difficulty that may be supposed to exist, in deciding what are the cases in which a vendee can refuse to accept, or can return the article, and either resist payment of the price, or recover it back if paid. A warranty, properly so called, can only exist where the subject-matter of the sale is ascertained and existing so as to be capable of being inspected at the time of the contract, and is a collateral engagement that the specific thing so sold possesses certain qualities; but the property passing by the contract of sale, a breach of the warranty cannot entitle the vendee to rescind the contract, and re-vest the property in the vendor, without his consent; the vendee must therefore resort to an action for such breach, or give it in evidence in reduction of the price, or as an answer to the action if the breach renders the article wholly worthless." Here, everything is specific and defined. The distinction in *Young v. Cole* between a condition and a warranty, and the observations thereon in *Dawson v. Collis*, apply to every one of the cases cited for the defendants. In *Young v. Cole*, the contract was for one thing, and the seller delivered another. The same remark will apply to *Gardiner v. Gray* and *Nichol v. Godts*. Here, the seller delivered what he contracted \*855] \*to deliver, and the buyer received what he contracted to buy: the warranty as to sulphur was altogether collateral. *Lucy v. Mouflet*, 5 Hurlst. & N. 229,† was also a sale of an ascertained chattel. *Gompertz v. Bartlett*, 2 Ellis & B. 849 (E. C. L. R. vol. 75), is similar to *Young v. Cole*. [WILLES, J.—The property does not pass by the contract of sale; but only upon acceptance, after inspection and weighing. Our law is peculiar in that respect. Is there any case in which it has been held that the seller can put the property on the buyer against his will, if he repudiates the contract before the seller has done all that he has to do to the goods?] The buyer is not bound to accept something only colourably answering the description of the thing sold. Here, the hops were in the defendants' own warehouse; and the moment they were examined and weighed, everything had been done on the seller's part to vest the property in them in the defendants: *Simmons v. Swift*, 5 B. & C. 857 (E. C. L. R. vol. 11), 8 D. & R. 693 (E. C. L. R. vol. 16). The reasoning in *Street v. Blay* has always been accepted as conclusive. In *Gompertz v. Denton*, 1 C. & M. 207,† Lord Lynd-

hurst says: "The case of *Street v. Blay* seems to have been very much considered. That case shows that you cannot treat a contract as rescinded on the ground of the breach of warranty, except there was an original agreement that the party should be at liberty to rescind in such case, or unless both parties have consented to rescind it." That has always been followed down to the present time; and the principle of it is entirely applicable here. In *Parsons v. Sexton*, 4 C. B. 907 (E. C. L. R. vol. 56), Wilde, C. J., says: "It is now settled that the breach of a warranty is no answer to an action for the price of a specific chattel sold, although it may be used in reduction of the price, or made the subject-matter of a cross-action." And in *Pateshall v. Tranter*, 8 Ad. & E. 103 (E. C. L. R. vol. 80), 4 N. & M. 649 (E. C. L. R. vol. 80), \*Parke, J., says: "According to the judgment of this Court in *Street v. Blay*, the purchaser of a specific chattel, having accepted [\*856 it, not only is not bound to return it on a failure of warranty, but cannot do so." The subject has also been fully considered in the American Courts, and the same conclusion arrived at. In *Thornton v. Wynn*, 12 Wheaton 183,—which was decided four years before *Street v. Blay*,—it was held, that, if the sale (with a warranty) be absolute, and there be no subsequent consent to take back the article, the contract remains open, and the vendee must resort to his action upon the warranty, unless it be proved that the vendor knew of the unsoundness of the article, and the vendor tendered a return of it within a reasonable time. In the subsequent case of *Voorhees v. Earl*, 2 Hill 288, it was held, that, where there is a warranty as to quality on the sale of goods, but no fraud, and no stipulation that the goods may be returned, though the warranty be broken, the vendee cannot rescind the contract without the consent of the vendor. Cowen, J., there says: "Where there is a warranty on a sale of goods, without fraud, and no stipulation in the contract that the goods may be returned, the vendee has no right to annul the contract without the consent of the vendor. The only remedy is by an action on the warranty. Such, after much fluctuation, appears to be the doctrine of Westminster Hall: *Street v. Blay*, 2 B. & Ad. 456 (E. C. L. R. vol. 22). In this case, Lord Tenterden examined the question both on the nature of the contract and the weight of authority; and, on going through with his argument, it is difficult, and I think impossible, to resist the conclusion to which he came. Of course he distinguishes between a sale and an executory contract, in which latter case the goods may generally be returned as soon as they are found not to satisfy the contract, if the purchaser \*have done nothing in [\*867 the mean time beyond what is necessary to give them a fair trial. That case was followed by the Court of Exchequer in *Gompertz v. Denton*, 1 C. & M. 207,† and substantially by the K. B. in *Pateshall v. Tranter*, 8 Ad. & E. 103 (E. C. L. R. vol. 80), 4 N. & M. 649 (E. C. L. R. vol. 80). See also *Freeman v. Baker*, 5 C. & P. 475 (E. C. L. R. vol. 24). The question was also very ably examined by Washington, J., in *Thornton v. Wynn*, 12 Wheaton 183, who came to the same result, in which he was sustained by the Supreme Court of the United States. This decision was acted on by the Court of Appeals in Kentucky, in *Lightburn v. Cooper*, 1 Dana 273. I am not aware of any case in this Court which conflicts with those I have referred to."

*Cur. adv. vult.*

ERLE, C. J., now delivered the judgment of the Court : (a)

In this case the plaintiff obtained a rule to set aside the verdict for the defendants, and enter it for the plaintiff, on the ground that the stipulation that no sulphur had been used in the growth of the hops did not amount to a condition that the hops might be rejected if sulphur had been used. The plaintiff argued that the contract must be so construed because it related to a specifically ascertained chattel; and for this he cited some expressions in the judgment of *Street v. Blay*, 2 B. & Ad. 456 (E. C. L. R. vol. 22). The defendants, on the other hand, contended, that the contract here in question was an executory contract; that the intention of the parties governs in all contracts whatsoever; that, upon the evidence, it was clear that the stipulation in question was intended by these parties to be a \*condition; and that the case \*858] of *Street v. Blay* had no application.

We propose to state the evidence in some detail, so as to show the meaning of the finding of the jury.

At the close of the trial, the jury were requested to give specific answers to certain questions. Those questions comprised all that was in contest between the parties, and cannot be properly understood without taking them in combination with all that was uncontested, and keeping present to the mind the issue to which they relate.

The action was for hops sold and delivered. The first plea was, in effect, fraud, viz. that the plaintiff induced the defendants to buy by making a false representation that no sulphur had been used, and so forth. The second plea was non assumpsit. The evidence in support of the first plea consisted of these facts,—that, in 1854, sulphur had been used in the growth of hops, and the brewers affirmed that the hops had been injured thereby and their beer spoiled; and the hop merchants had given notice to the hop growers of their objection to buy hops in the growth of which any sulphur had been used: and the plaintiff and defendants, each knowing these facts, met and treated for the contract in question, the samples being produced. There was no substantial variance in the account given of that which passed at the interview when the contract was made. There were six witnesses present. All agreed, that, before the price was asked, the defendant inquired if sulphur had been used in the growth. The three witnesses for the defendants stated that the plaintiff answered distinctly “no,” and that the defendants said they would not ask the price if sulphur had been used. The plaintiff’s witnesses did not contradict them, but said the answer \*859] was, “There was no mould this year, \*and no occasion to use any sulphur,” and did not remember that the defendants had said they would not ask the price if any sulphur had been used. The treaty then went on, and eventuated in a contract to sell and deliver the bulk in accordance with the samples after some days should have elapsed. The hops were accordingly sent, and corresponded with sample, and were weighed and delivered into the defendants’ possession. Afterwards, the defendants repudiated the hops, and proved that sulphur had been used.

The uncontroverted facts were, that sulphur had been used on five acres out of three hundred; that these sulphured hops were so mixed with the unsulphured as to be undistinguishable; that the plaintiff re-

(a) The case was argued before Erle, C. J., Williams, J., Willes, J., and Byles, J.

presented that no sulphur had been used; that the defendants would not have bought the hops if they had known that fact, and could not sell them as they were, in the ordinary course of their dealings with their customers.

The counsel agreed with the Judge that there were two principal questions for the jury. On the first, the contest was in substance confined to the point whether the representation was wilfully false: and this question was answered by the jury in the negative. The second question then became material; and it was framed with reference to the same evidence, and on the assumption that the same facts were undisputed,—the term “affirmation” being substituted for “representation,” as more appropriate to a matter of contract, to the minds of all concerned in the trial.

Thus, the question was,—“Was the affirmation that no sulphur had been used intended between the parties to be part of the contract of sale, and a warranty by the plaintiff?”

As to this, it was contended on one side that the conversation relating to the sulphur was preliminary \*to entering on the contract, and no part thereof, both from the form of expression and also from [\*860 the written guarantee which was shown to have been given. On the other side it was contended that the whole interview was one transaction, that the intention of the parties was alone to be regarded, that the defendants had declared the importance they attached to the inquiry, and that the plaintiff must have known it. And the jury answered this question in the affirmative.

The effect of this finding of the jury, taken with the evidence, is now to be considered. We avoid the term “warranty,” because it is used in two senses, and the term “condition,” because the question is whether that term is applicable. Then, the effect is that the defendants required, and that the plaintiff gave his undertaking, that no sulphur had been used. This undertaking was a preliminary stipulation; and, if it had not been given, the defendants would not have gone on with the treaty which resulted in the sale. In this sense it was the condition upon which the defendants contracted; and it would be contrary to the intention expressed by this stipulation that the contract should remain valid if sulphur had been used.

The intention of the parties governs in the making and in the construction of all contracts. If the parties so intend, the sale may be absolute, with a warranty superadded; or the sale may be conditional, to be null if the warranty is broken. And, upon this statement of facts, we think that the intention appears that the contract should be null if sulphur had been used: and upon this ground we agree that the rule should be discharged.

Rule discharged.

**ADDITIONAL CASES**

**FROM**

**CONTEMPORANEOUS REPORTS.**

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**THE EUROPEAN AND AUSTRALIAN ROYAL MAIL COMPANY (Limited) v. THE ROYAL MAIL STEAM-PACKET COMPANY. April 22, 1861.(a)**

Where one of two contracting parties so conducts himself as to hinder the performance of the contract by the other, or to subject the latter to an action at the suit of some third person if he duly perform the contract, no action will lie for the non-performance.

When a bailor mortgages the chattel bailed, and the mortgagee has a right to demand possession from the bailee and does demand it, the bailee may refuse to give the chattel up to the bailor. The plaintiffs delivered a ship to the defendants under a contract, which provided, among other things, that the defendants should during the continuance of the contract and while the ship remained in the possession and use of the defendants, pay and discharge certain claims which would arise against the owners of the ship for its expenses, and upon the determination thereof re-deliver the ship to the plaintiffs. The plaintiffs afterwards mortgaged the ship, and certain expenses were incurred within the above provision, and after that the mortgagees demanded possession under their mortgage:—Held, first, that such mortgage and demand were an answer to the claim of the plaintiffs to have the ship redelivered to them; but secondly, were no answer to their claim to have the expenses paid.

FIRST count, that the plaintiffs, at the request of the defendants, delivered to the defendants, and allowed them to have the possession and use of a certain ship or vessel, belonging to the plaintiffs, and called the Australasian, under a certain agreement, upon the terms, among other things, that the defendants should, during the continuance of the said agreement and while the said ship remained in the possession and use of the defendants, bear, pay, and discharge all the salary and wages of the officers, sailors, and crew of the said ship, and all lawful claims and demands of such officers, sailors, and crew against the owners for the time being of the said ship, and also that the defendants should upon the determination of the said agreement deliver back and give up the possession of the said ship to the plaintiffs, or their agents, and the defendants accepted the said ship, and had the possession and use thereof under the said agreement, and upon the terms aforesaid. That afterwards the said agreement was determined, and the plaintiffs did all

things on their part to be done, and all things happened to entitle them to have the said ship delivered back and given up by the defendants to the plaintiffs or their agents. First breach, that the defendants did not so deliver back and give up the said ship, but detained the said ship and retained possession of the same without the leave or permission of the plaintiffs and against their will, for a long time, and during all that time employed and made use of the ship on their own account and for their own benefit. Second breach, that although the defendants did afterwards and after such detention as in the said first breach mentioned, quit and relinquish possession of the said ship, and although the plaintiffs did all things on their part to be done, and all things happened to entitle the plaintiffs to have the salary, wages, claims, and demands of the said officers and crew borne, paid, and discharged by the defendants during the time that the said ship remained in the possession and use of the defendants, and up to the time of such quitting and relinquishment of possession, yet the defendants did not pay or discharge such salary, wages, claims, or demands, either for or in respect of services rendered and matters and things happening and arising during the continuance of the said agreement or afterwards, and during the time the defendants so detained and retained possession of the said ship, as in the said first breach mentioned and at the time when the defendants so quitted and relinquished possession of the said ship as aforesaid, a large sum of money was due and owing to such officers, sailors, and crew, respectively, for or in respect of such salary, wages, claims, and demands, and such sum of money was not, nor was any part thereof, ever borne, paid, or discharged by the defendants. The fourth and seventh counts were similar to the above, and applied to two other vessels, the European and the Columbian.

Fifth plea, to the first count, so far as it relates to the first breach, that the said agreement was and is an agreement in writing in the words following, that is to say,—Memorandum of agreement between the Royal Mail Steam-Packet Company, of the one part, and the European and Australian Royal Mail Company (Limited), of the other part, as follows:—In anticipation of the amalgamation of the two companies above named, and in the view of their being in the mean time worked on terms of the basis of amalgamation approved of by the said companies respectively, it is agreed—First, that the Royal Mail Company shall undertake the fulfilment of the contracts existing between the European and Australian Company and Her Majesty's government for the conveyance of mails between the United Kingdom and Australia and India. Secondly, that the vessels required for this service shall be furnished by the European and Australian Company to the extent of their existing stock of vessels, which shall continue to be used so far as required in and towards performing the service between Suez, Australia, and India, and the Royal Mail Company shall furnish upon charter, at a rate not exceeding 3700*l.* per month in all, exclusive of coals, at least two vessels suitable for performing the service between Southampton and Alexandria and between Marseilles and Malta, and that in the event of the Royal Mail Company having any other vessels of their own which are not required for their own contract service, the same shall be chartered, if wanted, by the joint committee after mentioned in the name of the European and Australian Company, upon such terms as may be agreed

upon, any other vessels required to be chartered by third parties to the joint committee in like manner. Secondly, that the costs of all vessels chartered for any part of the service shall be considered as part of the working expenses, and shall be met by the Royal Mail Company accordingly. Thirdly, that in carrying out this agreement, and for the purpose of the companies being worked as aforesaid, a committee shall be appointed, consisting of six directors of the Royal Mail Company and three directors of the European and Australian Company, any three of that number to form a quorum, provided that two of the number be directors of the Royal Mail Company and one at least of the European and Australian Company. Fourthly, that the accounts of receipts and payments in connection with the fulfilment of the contracts of the European and Australian Company shall be kept separate from the accounts proper of the Royal Mail Company. Fourthly, that any questions that may arise in the settlement of such accounts or in apportioning the expenses incident to the services of both companies shall in the first instance be left to the decision of the chairman of the two companies respectively, or in case of their not agreeing to the decision of the Hon. Samuel Cunard, whom failing, the decision of an umpire, to be previously named by the two chairmen. Fifthly, that the Royal Mail Company shall provide all the necessary stores and all other matters required in the employment of the ships, and shall receive all moneys payable for freight, passengers, or otherwise in connection with the service; and for this purpose the European and Australian Company shall give an order to Her Majesty's government for the payment to the Royal Mail Company of all moneys due for services begun and performed under the contract with the government, from and after the 30th of June last; during the subsistence of this agreement the Royal Mail Company not being bound to provide the working expenses in respect of any voyages which shall have been commenced prior to the said 30th of June. Sixthly, that in order to determine what matters properly belong to the working accounts of the two companies the Royal Mail Company shall, subject to the express provisions of this agreement, adopt as a model the working accounts of the Royal Mail Company exhibited at the last general meeting of their proprietors. Seventhly, that the Royal Mail Company shall take over from the European and Australian Company all such stores, coals, and other matters as they may now possess, and which may be required for the working of the vessels, giving credit to the European and Australian Company in account for the cost price thereof, and making payment of the same when required; it being understood that such payment may be made by bills at four or six months, in the option of the Royal Mail Company, and also that they are not to be in cash advanced beyond the value of the portion of the said coals and other stores consumed for the time being, and that such coals and stores shall be in the mean time insured against fire by and at the expense of the European and Australian Company. Eighthly, that the working accounts shall be made up to the 31st of December next and to the 30th of June following, or as soon as may be practicable after those periods, and that the balance (if any) appearing to the credit of such working accounts shall be carried to a reserved fund in terms of the basis of amalgamation; but if the balance be the other way, the same shall be debited to the European and Australian Company, it being

understood that, in the event of the amalgamation not being effected, a balance shall be struck between the debits and credits appearing on such accounts respectively. Ninthly, that the Royal Mail Company shall be allowed five per cent. interest upon all moneys actually advanced by them in the execution of this agreement, allowing interest in like manner upon all moneys when received by them. Ninthly, that the Royal Mail Company shall not be liable or responsible, as between them and the European and Australian Company, for any losses or damages, from whatever cause arising, which may be sustained during the continuance of this agreement in the fulfilment or execution thereof; it being understood, however, that as regards vessels chartered from the Royal Mail Company, that Company is to stand in the same position as the owners of other chartered vessels. Tenthly, that application shall be made to parliament in the ensuing session for an Act to enable the Royal Mail Company to amalgamate with the European and Australian Company, upon the basis already agreed to by the shareholders of both companies at meetings called for the purpose; and that in the event of such Act of Parliament being obtained, the present arrangement shall be considered to have been on account of the amalgamated Company. Eleventhly, that in the event of the failure of such application to parliament, the present arrangement shall notwithstanding subsist in full force, and continue to be acted upon for the period of nine months from and after such failure, and that then the European and Australian Company shall take over at the cost price the coals and other stores then remaining in connection with the said service, dated the 9th of September, 1857. Averment, that before the time when, according to the said contract in that behalf, the defendants were to deliver back and give up possession of the said ship to the plaintiffs or their agents had elapsed, they, the plaintiffs, assigned the said ship to certain third parties, by way of mortgage, for a certain debt, which last-mentioned parties thereupon became and were, as such mortgagees as aforesaid, owners of the said ship, so far as was necessary for making the said ship available as a security for the said mortgage-debt; and that afterwards and before the time had elapsed when, according to the said contract, the defendants were to deliver back, and to give up possession of the said ship, the said mortgagees, then still being such mortgagees and owners, did, as such, at the request of the plaintiffs, and against the will of the defendants, and in order to make the said ship available as a security for the said mortgage-debt, which was then due and unpaid, take the said ship out of the possession of the defendants, and never again suffer the defendants to have the possession or use of the same; and from and after the time when the mortgagees so took possession of the said ship, they, the plaintiffs, did not allow the defendants to have the possession or use.

Eighth plea to the first count, so far as it relates to the second breach, the defendants repeat all the allegations in the fifth plea contained; and the defendants say, that from and after the time when the plaintiffs so mortgaged the said ship, the plaintiffs did not allow the defendants to have the use or possession thereof, although the defendants, in fact, had the use and possession thereof; and the defendants say, that all the said salary, wages, claims, and demands, in the said second breach mentioned, became due and payable after the plaintiffs had so mortgaged the said ship, and ceased to allow the defendants to have the possession and use

thereof, and before the mortgagees so took possession thereof; but the defendants, in fact, continued to have the possession and use thereof when the same salary, wages, claims, and demands respectively became due and payable, though not under or by virtue of the alleged allowance of the plaintiffs.

Nineteenth plea to the fourth count, the same allegations as the sixteenth, with respect to the European.

Thirty-eighth plea to the first count, as far as it relates to the first breach—That the said agreement was and is the agreement in writing set out in the fifth plea; and the defendants say, that before the time when, according to the said contract in that behalf, the defendants were to deliver back and give up possession of the said ship to the plaintiffs or their agents had elapsed, they, the plaintiffs, had assigned the said ship to certain third parties, by way of mortgage, for a certain debt, which last-mentioned parties thereupon became and were, as such mortgagees as aforesaid, owners of the said ship, so far as was necessary for making the said ship available as a security for the said mortgage-debt, which last-mentioned persons before and at the time when the defendants, according to the said contract, were to deliver back and give up possession of the said ship, under and by virtue of the said mortgage, required of the defendants to have such possession from the defendants, and such possession was then necessary to them for making the said ship available as aforesaid as a security for the said mortgage-debt, which was then still unpaid, of all which before and at the time when, according to the said contract, the defendants were to deliver back and give up possession of the said ship, they, the defendants, had notice, wherefore they did not deliver back and give up the said ship to the plaintiffs or their agents.

The thirty-ninth and fortieth pleas were similar to the thirty-eighth, but pleaded to the fourth and seventh counts respectively.

Demurrer and joinder.

*Montague Smith* (*J. Brown* with him), for the plaintiffs.—As to the eighth and nineteenth pleas, neither the mortgage nor the subsequent taking possession by the mortgagees could excuse the defendants from the payment of these salaries and wages. The mortgagees would not be entitled to any of the earnings of the vessel before taking possession: *Gardener v. Cazenove*, 1 H. & N. 423;† s. c. 26 Law J. Rep. N. S. Exch. 17, and *Willis v. Palmer*, 7 C. B. N. S. 240 (E. C. L. R. vol. 97); s. c. 29 Law J. Rep. N. S. C. P. 194. Therefore, it is plain that the mortgagees could not claim these moneys. The defendants had the actual possession of the ship during this time, and that is sufficient. [ERLE, C. J.—The mortgagees would not have had freight till they had actually taken possession.] As to the thirty-eighth, thirty-ninth, and sixtieth pleas. The action is founded on contract, by which the defendants agreed to pay certain sums to the plaintiffs while the bailment lasted, and when it came to an end to restore the ship. Now, the pleas admit that the bailment is at an end, and that the defendants promised to restore on that event, and therefore show a clear cause of action unanswered. Here there is no actual transfer of the ship, and unless the mortgagees enforced their security against the defendants, they could not be excused from delivering back the ship as they promised. A mere threat is not sufficient; there must be an actual enforcement of rights

by the mortgagees. The law is laid down in Story on Bailments, ss. 108 and 266, "If a bailor, after a deposit, transfers to another person his right to the things deposited, the latter cannot (it is said) come and get a delivery of it to himself; but the bailee, if he chooses, may deliver it to the person to whom it is transferred, and it will be a justification." And, "Even if the lender is not the owner of the thing, the borrower must ordinarily restore it to him, and has no right to set up the title of a mere stranger against him, for the lender has, by his contract, a right to be reinstated in his possession. However, if in the mean time a recovery has been had against the borrower without his default, or if the thing has been attached in his hands in an adverse suit, that will constitute a sufficient excuse." Here there is an express contract to re-deliver, and a breach of that contract.

*Bovill* (*Holland* with him), for the defendants.—As to the thirty-eighth, thirty-ninth, and fortieth pleas. The defendants are justified, for they show that the plaintiffs have no longer any title to the possession of the ship. No doubt, upon every bailment there is an implied contract to deliver back the chattel; but if a bailor deprives himself of the ownership of the chattel bailed, the implied contract is at an end. Here the act of the bailor is an authority to the mortgagees to require possession, and to the bailee to deliver to the mortgagees; and the mortgagees have required possession, and after that the defendants would be liable to an action by the mortgagees if they delivered up possession to the plaintiffs. A tenant cannot dispute his landlord's title, but he may always show that it has expired. And there is the same law in the case of goods. Unless notice has been given, the *jus tertii* cannot be set up; but here it has been given. In *Ogle v. Atkinson*, 5 Taunt. 759 (E. C. L. R. vol. 1), it was held, that a warehouseman receiving goods from a consignee, who has had actual possession of them, to be kept for his use, may, nevertheless, refuse to redeliver them if they are the property of another. [WILLIAMS, J.—And demanded by him, I suppose.] There was only a notice to detain, not to deliver up. [WILLES, J.—All the cases are collected in *Sheridan v. The New Quay Company*, 4 C. B. R. N. S. 618 (E. C. L. R. vol. 93); s. c. 28 Law J. Rep. N. S. C. P. 58.] It is said that there must be a delivery up, but in nine cases out of ten that is not so. He must defend himself against one or the other; if he delivers up, he might give his goods to the wrong person, and the only right course is for the bailee to hold his hand. *Phillips v. Robinson*, 4 Bing. 106 (E. C. L. R. vol. 13), is in the defendants' favour; there the plaintiff claimed the title-deeds of an estate, of which he had levied a fine subsequently to the bailment of the deeds. [WILLES, J.—One way of testing it is to see whether the defendants might have interpleaded. That they might have done, as the title of the third person arises from the plaintiffs. BYLES, J.—Is there any implied obligation to restore to the bailor at all events, or only so long as the thing bailed is his?] That is the distinction for which the defendants contend. What answer would they have to the mortgagees with whom they have been dealing by the authority of the mortgagors? Upon this point he also cited Vin. Abr. tit. *Detinue*, (C), Nos. 2, 3, Pothier, *Prêt à Usage*, vol. 4, p. 14, cap. 2, par. 30, Dupin's edit. of 1827, *Traité du Dépôt*, ch. 5, s. 55, *Cheesman v. Exall*, 6 Exch. 341,† s. c. 20 Law J. Rep. N. S. Exch. 209, *Thorne v. Tilbury*, 3 H. & N. 534,† s. c. 27 Law J. Rep.

N. S. Exch. 407, *Wilson v. Anderton*, 1 B. & Ad. 456 (E. C. L. R. vol. 20), *Dixon v. Yates*, 5 B. & Ad. 313 (E. C. L. R. vol. 27), and *Franklin v. Neate*, 13 M. & W. 481,† s. c. 14 Law J. Rep. N. S. Exch. 59. Secondly, as to the eighth and ninth pleas, the pleas are good. The plaintiffs say they have paid the wages, and are therefore entitled to sue; but to see whether that is so, the declaration and the fifth plea must be read together, and they amount to this, that the defendants were to pay the wages so long as the plaintiffs allowed them to have possession under the agreement. [ERLE, C. J.—Suppose the mortgage had existed prior to the agreement?] Then the mortgagees would have permitted the mortgagor to have possession. [ERLE, C. J.—So he does in any case till he takes possession.] The mortgagees became owners of the ship by virtue of the mortgage alone, and as such entitled to the benefit of these payments: *Dickenson v. Kitchen*, 8 E. & B. 789 (E. C. L. R. vol. 92). That case is also an authority on the other point. He also cited *The European and Australian Royal Mail Company (Limited) v. The Royal Mail Steam Packet Company*, 4 Kay & John. 676, and *De Mattos v. Gibson*, 28 Law J. Rep. N. S. Chanc. 165, 498. The plea is, in fact, a traverse of the contract sued upon.

*Montague Smith*, in reply, was told to confine himself to pleas thirty-eight, thirty-nine, and forty.—This action is not detinue, but in contract, and much that has been said does not apply, because here the ship remains in the possession of the mortgagor for the purposes of use. He may charter the ship and earn freight: *Smith v. Bowles*, 10 East 239. The mortgagor makes an agreement which is equivalent to an express condition for redelivery, although no specific mention of it is made. The defendants have not given up the ship to the plaintiffs or the mortgagees; if they had delivered up to the mortgagees, no doubt that would have been an answer; but here there is an absolute agreement to give up, and the defendants cannot in that case set up the *jus tertii* while the thing is in their hands (per Parke, B., in *Cheesman v. Exall*). [ERLE, C. J.—Does not the plea show that all that the mortgagees were required to do, to take possession, has been done? The ship may have been abroad.] The plea does not show that the mortgagees are acting hostilely to the mortgagors. [BYLES, J.—The mortgagees have shown title and demanded possession.] Still the defendants cannot dispute the title of the plaintiffs: *Gosling v. Birnie*, 7 Bing. 339 (E. C. L. R. vol. 20); s. c. 9 Law J. Rep. N. S. C. P. 104. The cases as to carriers are distinguishable on the ground of their being compellable to receive the goods.

ERLE, C. J.—The substance of the eighth plea is this, that after this agreement the plaintiffs mortgaged the ship, and the mortgagees became entitled to it, and the plaintiffs did not allow the defendants to have possession; meaning it in this sense, that after the mortgagees had the right they might have taken possession; and we are to try the point whether, when the defendants had promised to pay while they had possession, it is any answer to say that some one else might have taken possession and had not done so. They have had actual possession, and the promise applies. As between the mortgagors and the mortgagees, it might happen that the defendants were taking all the profits of the ship, and not paying at all. I, therefore, think that the eighth plea is bad. The nineteenth is pleaded to the same breach in respect of another ship, and the same judgment applies. The thirty-eighth is pleaded to

the second breach, and the declaration having alleged a promise that the defendants would redeliver the ship to the plaintiffs, and that the right of possession had come to an end, yet that the defendants refused to redeliver, the thirty-eighth plea says, that after that the plaintiffs mortgaged the ship, and the mortgagees gave notice thereof to the defendants, and required of the defendants to have possession of the ship from the defendants, and such possession was then necessary to them for making the said ship available as a security for the mortgage-debt, and so they bring the case within the 30th section of the Merchant Shipping Act, and that is alleged as an excuse. That is a good plea. The owners put the defendants in possession and take the promise stated, and, I think, that was subject to the condition, which applies very widely in contracts, that where performance of the contract is required, it is an excuse, if the party to whom it is made has hindered the performance of it, and it seems to me that the plaintiffs in this case have done an act which hinders the performance of this contract. They have mortgaged the ship, and the mortgagees have defeated their title. The principle against the plaintiffs on this point is, that if the defendants gave back the ship they would be liable to an action of trover by the mortgagees, and the plaintiffs, to whom the promise was made, have so changed their situation as to make it an actionable wrong done by the defendants if they keep their promise. That is an excuse by reason of what the plaintiffs have done. *Sheridan v. The New Quay Company* contains a collection of all the learning on the subject, as to the transfer of rights to goods in the hands of a bailee, and the principle of the judgment is that on which I give mine. The same judgment applies to the twenty-ninth and fortieth pleas.

WILLES, J.—I am of the same opinion. The sum of the case is, that the plaintiffs have certain vessels, and that an amalgamation was contemplated between the companies, and it was agreed that the defendants should receive the vessels and work them, and that they should pay the expenses during the period agreed, which expenses should be brought into account on the final settlement of affairs under the agreement, and that was to last for a time, at the expiration of which the vessels were to be handed back, unless there was a new arrangement. The defendants during the period did have possession of the vessels, and were in a position to fulfil the agreement in so far as it was onerous but less beneficial during the time they contracted to pay, and were then called upon to give up the vessels. Then the defendants, as an excuse for not performing their promise, set up that before the expenses were incurred and the time for giving up came, the plaintiffs charged the vessels. Now, they have had the use of the vessels, and it is quite clear that no action can be brought against them by the mortgagees on this part of the contract, and, therefore, they have no excuse. But as to the other part, a very different question arises—a question of property. At the time the defendants entered into this contract the plaintiffs were owners of the vessels, and the contract to give up was made with reference to that relation, and on the faith that the plaintiffs would be the persons entitled, subject to this, that they might appoint other persons to receive, or might interfere so as to prevent the defendants from giving up the ship, or, at least, without peril to themselves. On this ground, I think that the defendants are excused; they could not give up the vessels without

subjecting themselves to an action, and that is not what they contracted to do; therefore, on this point my judgment is for the defendants.

BYLES, J., and KEATING, J., concurred.

Judgment for the plaintiffs on the 8th and 19th pleas, and for the defendants on the 38th, 39th, and 40th.

### GREEN and Another v. MULES. April 24, 1861.(a)

The defendant employed the plaintiffs to find a purchaser or mortgagee of an estate. Thereupon the plaintiffs went down to the estate, valued it, put it in their books, advertised it in their circulars and in newspapers, and took some journeys and had communications about it, and ultimately, while negotiating with one N. upon the matter, the plaintiffs and the defendant agreed that a letter should be written by the plaintiffs to N. and that if such letter induced N. to become purchaser or mortgagee the plaintiffs should be paid 100%. N. ultimately became mortgagee, but denied that he was influenced in any way by the letter:—Held, that the plaintiffs could not recover on a quantum meruit on the common counts for work and labour, &c., with particulars claiming commission as agreed.

*Semble*—That they could not recover at all.

THE declaration contained the common counts for work and labour, &c.  
Plea—Never indebted.

The particulars were as follows:—

- "1859, May.—To receiving instructions to continue exertions to obtain a purchaser for the Dedham Grove estate, failing which to obtain a sum of money on mortgage, as defendant was much pressed to pay off various mortgages existing on the said property . . . . .
- "Journey to Dedham, waiting upon defendant, accompanying him over the property and conferring with him thereon . . . . .
- "Paid travelling expenses . . . . .
- "Drawing report of survey and laying the same before Messrs. Cuddan & Sons and various parties . . . . .
- "To interview with Mr. Newman, who was referred by defendant to plaintiffs. Going into valuation of the property with that gentleman, and conference with him thereon. Interview with defendant afterwards and drawing up letter to Mr. Newman, recommending the advance, when the defendant agreed that our commission should be 100% if that gentleman carried out the matter, which he ultimately did, and advanced the defendant the sum of 13,000£., or thereabouts, secured by mortgage of the Dedham Grove estate . . . . .
- "To commission on the above business as agreed . . . . . £100."

The cause was tried, at the Sittings in London after last Hilary Term, before Willes, J., when it appeared that the plaintiffs were auctioneers and estate agents, and the defendant was the owner of an estate at Dedham, which he desired to sell or mortgage, and for that purpose he applied to the plaintiffs, who went down to the estate and valued it, and upon their return inserted it in their printed Monthly Circular, advertised it in several newspapers, and corresponded with several persons on the subject, and among the latter was a Mr. Newman, who made several propositions; but the negotiation not proceeding rapidly the plaintiffs and the defendant agreed that the former should write a letter to Newman, and that if he should make an advance or purchase in consequence of that letter the plaintiffs should have 100%. Newman did advance the sum required on mortgage, but at the trial denied that he was at all influenced by the letter. The defendant thereupon contended

that the plaintiffs should be nonsuited, but the plaintiffs claimed to recover upon a quantum meruit for the work they had done. The question was left to the jury, but leave was reserved to the defendant to move to enter a nonsuit. The jury found for the plaintiffs, damages 35*l*. A rule having been obtained pursuant to the leave reserved, and also for a new trial on the ground of misdirection in leaving the matter to the jury,—

*Garth* (*Lush* with him) now showed cause.—Either the advance was obtained by the letter, or the matter was taken out of the hands of the plaintiffs. It is not disputed that the plaintiffs did the work mentioned in the particulars; they went to Dedham and incurred expense in that and other ways, which would have been covered by the 100*l*. commission, and if they do not have that, they ought, at least, to have their expenses. [BYLES, J.—You say that the contract provides for payment on a certain contingency which has not happened, but that is not to prevent you from having payment on the contingency which has happened.] Yes. The particulars set out all that has been done, and claim 100*l*. Why should not the plaintiffs recover a less sum? The particulars are fuller than usual, and set out all that has been paid and everything that has been done. [WILLES, J.—A claim upon a quantum meruit would have enabled the defendant to get proper particulars and pay money into Court, but under these particulars he would not have been able to do that.] If the words “as agreed” had not been in the particulars the plaintiffs would have been clearly entitled. Then, is the insertion of those words to prevent them from recovering for what has been done? Suppose the particulars had been for the price of seven beasts at 20*l*., as agreed, and everything proved except the agreement, if the jury thought 20*l*. a reasonable price the plaintiffs might have recovered it. The defendant must have known what his own case was, and could not have been misled. The particulars are in the same form as in *Prickett v. Badger*, 1 C. B. N. S. 296 (E. C. L. R. vol. 87), s. c. 26 Law J. Rep. N. S. C. P. 33, where the plaintiff recovered on a quantum meruit, failing to prove his right to the whole commission. He also cited *Kirkman v. Jervis*, 7 Dowl. P. C. 678; *Lines v. Rees*, 1 Jur. 593; *Singleton v. Barnett*, 2 Cr. & J. 368; and *Harris v. Montgomery*, 11 C. B. 393 (E. C. L. R. vol. 73); s. c. 20 Law J. Rep. N. S. C. P. 221.

*Chambers* and *Philbrick*, for the defendant, were stopped by the Court.

ERLE, C. J.—I am of opinion that this rule should be made absolute. The defendant was owner of an estate which he was seeking to sell or mortgage, and he communicated with the plaintiffs to find him a purchaser or mortgagee, and the evidence relied on by Mr. *Garth* of what was done shows that ultimately the parties came to an agreement that a letter should be written by the plaintiffs, and that if that letter resulted in business the plaintiffs should be entitled to 100*l*., and I think that shows the ground on which the parties meant that the defendant should be liable to the plaintiffs, viz. if they brought Newman to the point the defendant should be liable to them for 100*l*., if not he was not to be liable at all. It is clear that the letter did not find the purchaser, but the plaintiffs came into Court relying on that agreement, and in the fullest expectation that Newman would say that the letter had influenced him in becoming mortgagee; but he proved the reverse, and therefore

that the defendant had obtained what he desired entirely without the aid of the plaintiffs. Down to this point Mr. *Garth* would not disagree, but then he says that the plaintiffs have a claim to remuneration for putting the matter in their books, advertising, some journeys and some communications. No case has been cited bearing on the particular facts of this case. Where goods have been delivered they must be paid for according to their value, but in certain cases services which have been performed are of no value, and this is one of those cases. Where menial services have been performed there is value for a time, but here the services are such that the defendant has had no value at all. In a great number of instances house-agents go to a great deal of trouble, on the terms that if they get no purchaser they shall have no claim. They claim largely, and often justly, on the ground that they are obliged to put down names and get nothing. Upon the facts stated by the learned Judge the defendant came into Court, believing that he had to dispute the claim for 100*l.*, and nothing else; then the plaintiffs ought to be nonsuited. The learned Judge thinks this was the effect of the evidence, and I agree.

WILLES, J.—I am of the same opinion. The plaintiffs having no claim against the defendant, the latter had agreed that if they would write the letter, and Newman should act on it, then, although the defendant was not liable to pay commission, he would pay 100*l.*, and that was considered the final arrangement between them. The substance of the matter was, "If the letter is effectual, I (the defendant) will pay you 100*l.*, though not liable; if it is not effectual, I will pay you nothing." This is not like the case of *Prickett v. Badger*, where the plaintiff had done everything, but the employer took the matter out of his hands: for here the employment was to be at an end if Newman did not advance the money; if he did, the plaintiffs were to have 100*l.* It seems to me that on the contingencies which happened nothing was to be paid, therefore, on the substance of the matter, and on the view taken by the plaintiffs, they are not entitled to recover.

BYLES, J., concurred.

KEATING, J.—It is clear that the agreement was substituted for any contingent claim which the plaintiffs had before, and that that claim was given up in consideration of the special agreement to pay 100*l.*

Rule absolute.

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## ACCIDENTAL DEATH INSURANCE COMPANY v. MAC- KENZIE.(a) May 2, 1861.

Where a person, having possession of land under a good title, became tenant, and paid rent to a stranger:

Held, that he was not estopped, after his tenancy was determined, and before he had given up possession of the premises, from setting up his own prior title in an action of ejectment by his lessor.

THIS was an action of ejectment for offices and vaults at No. 6 Bank Buildings, tried at Guildhall, before Byles, J. At the trial it was proved

that the defendant occupied the premises in question, being part of No. 6 Bank Buildings, under an agreement dated the 20th September, 1853, from Messrs. Maltby, Robinson & Jackson, lessees of the whole house under the Bank of England. In 1858, Messrs. Maltby & Co. being in difficulties, the plaintiffs made arrangements for taking the whole of the house from the Bank, but took no assignment of the term from Messrs. Maltby & Co. From that time the defendant paid rent to the plaintiffs, and submitted to a distress put in by them. In March, 1860, the plaintiffs gave notice to the defendant to quit on the 29th September, which he refused to do; upon which the plaintiffs brought the present action. Owing to the evidence of the plaintiffs, the jury decided that there had been a new tenancy of the defendant to the plaintiffs from Michaelmas, 1859, upon which the verdict was entered for the plaintiffs, with leave for the defendant to move for a nonsuit, on the ground that the legal estate remained in the defendant under the original demise from Maltby & Co.; and that the plaintiffs never had any estate in the premises, and that the defendant was estopped from disputing the plaintiffs' title.

A rule having accordingly been obtained,

*J. Brown* showed cause and relied on a passage in Coke Litt. 47 b:—"If a man take a lease for years of his own land by deed indented, the estoppel doth not continue after the term ended; for by the making of the lease the estoppel determines." He also cited the *Duchess of Kingston's Case*, 2 Smith L. C. 651; *Fenner v. Duplock*, 2 B. 10; *Doe d. Plevin v. Brown*, 7 Ad. & E. 447 (E. C. L. R. vol. 34); *Delaney v. Fox*, 2 C. B. N. S. 768 (E. C. L. R. vol. 89); *Cooper v. Blandy*, 1 Bing. N. C. 45 (E. C. L. R. vol. 27); *Doe d. Johnson v. Brytup*, 3 Ad. & E. 188 (E. C. L. R. vol. 30); *Doe d. Marlow v. Wiggins*, 4 Q. B. 367 (E. C. L. R. vol. 45); *Doe d. Manton v. Austin*, 9 Bing. 41 (E. C. L. R. vol. 23).

*Watkin Williams*, in support of the rule, was stopped by the Court.—He cited *Cornish v. Searell*, 8 B. & C. 471 (E. C. L. R. vol. 15).

ERLE, C. J.—I am of opinion that this rule should be made absolute on the point of law. This was an action of ejectment for premises to which the plaintiffs had no title whatever; and the defendant having a title, the parties came to an agreement that the plaintiffs should demise to the defendant what he already had a good title to. What effect this might have had as to estopping the defendant from disputing the plaintiffs' title during the continuance of the demise, we are not called upon to determine. Here the plaintiffs put an end to the tenancy and then brought their action of ejectment; and now they strive to keep their verdict, on the ground that the defendant was estopped from disputing their title until he had restored the premises into their possession. If that rule applied the verdict would stand, and the moment after, the defendant might be plaintiff in another action of ejectment, and recover the same premises. I am fully aware of the salutary effect of the rule that the party who has derived possession from another shall not dispute his title until possession has been restored. I quite agree with Mr. *Brown* as to the effect of the cases he has cited, where one party has attorned to another; and I entirely adhere to the principle laid down in those cases, that it is not competent to set up the title of a third party unless there has been fraud or misrepresentation. But, giving full effect to the general principle, I can find no authority for the doc-

trine that a person taking a lease of his own land is not entitled at the expiration of the term to dispute the title of his lessor. We do not overrule any authority; but, on the contrary, we agree with the passage cited from *Co. Litt.*

WILLES, J.—I am of the same opinion. I admit the importance of the rule obliging the person who has obtained possession of property as a tenant to another to give up possession to his landlord, and not set up the title of a third party, and that this rule is binding. But this is a case where the title of the tenant continuing after his tenancy expires, he is desired to give up possession at the end of his term. If the plaintiffs were to recover in this action the defendant might bring ejectment and recover the same premises on exactly the same evidence as has been given in this action; or, according to the doctrine laid down by the dissenting Judge (Coltman, J.) in *Newton v. Hurland*, 1 M. & G. 644 (E. C. L. R. vol. 39), he might have entered.

BYLES, J., concurred.

Rule absolute.

## IN THE EXCHEQUER CHAMBER.

**MERSEY DOCKS AND HARBOUR BOARD v. JONES and Others**  
(Churchwardens and Overseers of the Poor of the Parish of Liverpool). *May 13, 1861.*(a)

The trustees of certain public docks were by their Local Acts empowered to take tolls from vessels entering such docks, and the proceeds were to be applied to the repair and maintenance of the docks and harbour; and if the amount so raised should be more than sufficient for such purpose, then the tolls were to be lowered. By later Acts the trustees were empowered to raise money for building additional warehouses, and to levy rates for payment of the expenses, paying interest and maintaining the buildings so erected; but such additional warehouses were to be rateable to the poor as in the case of premises of which there was a beneficial occupation.

A case, known as the Liverpool case, reported in 7 B. & C. 61, was decided in 1827, in which the parties were to all intents and purposes the same as in the present case, and the court held that the Dock Company were not rateable in respect of the dock dues, nor of the premises used for the purposes of the dock, no individual having any beneficial occupation of the premises:

Held in the present case (affirming the decision of the Court of C. B.), that, as the Legislature, by its declaration as to the rateability of the additional warehouses and buildings created under the authority of the later Acts, had, by implication, acquiesced in the decision in the Liverpool case, it was not competent to this Court to interfere with that decision: and that therefore this particular property was exempt from poor-rates.

THIS was an appeal against a decision of the Court of Common Bench upon a special case. By a rate made for the relief of the poor of Liverpool, on the 2d June, 1858, the plaintiffs were assessed at 20,580*l.* 18*s.* 8*d.*, in respect of the dock estates within the parish. The rate was not appealed against, but the plaintiffs did not pay, consequently a distress was levied for non-payment, and the present case was stated in an action of replevin. The dock estates were originally vested in the corporation of the borough, as trustees under several statutes. Some portion of those estates were granted voluntarily by the corporation, other portions were sold by them to the trustees, and the remainder were bought by the trustees from private individuals, under

(a) 5 L. T., N. S., 186.

certain statutory powers contained in twenty-two Acts of Parliament, from 1 Anne to 21 Vict., the material clauses of which will be found set out in the case below, reported in 8 C. B., N. S. 144-145 (E. C. L. R. vol. 98). The question for the consideration of this Court was, whether the Mersey Docks and Harbour Board were rateable to the poor for the property mentioned in the assessment, but on this point the Court gave no decision, but affirmed the decision of the Court below, on the ground which will be found in the judgment.

*Bovill*, Q. C. (*Mellish*, Q. C., with him) appeared for the churchwardens and overseers.—In the Birkenhead Case, 2 E. & B. 148 (E. C. L. R. vol. 75), where the docks were under the same trustees as here, the premises were held rateable, and many early and late cases, not distinguishable from the present, are to the same effect, and the principles laid down in that case should be affirmed. [CROMPTON, J.—If you are right with reference to the Birkenhead Case, what do you say to the Liverpool Case? BLACKBURN, J.—Assuming the decision in that case to be erroneous, nevertheless it has not been overruled, but has been acted upon for many years.] The Liverpool Docks have never been rated, and *communis error facit jus*. [CROMPTON, J.—Where legislation has taken place with reference to an assumed state of the law, it is dangerous to disturb it.] No reason can be assigned why these, of all others, should be exempt. The Liverpool Case proceeded upon that of Salter's Load Sluice, 4 T. R. 730; but in *R. v. Temple*, 2 E. & B. 168 (E. C. L. R. vol. 75), Lord Campbell questions the propriety of the construction put upon the statute. He cited the *West Derby*, 6 E. & B. 711 (E. C. L. R. vol. 88); the *Lea*, 19 J. P. 310; the *Chirton*, 28 L. J. 140, M. C.; the *St. Luke's Hospital*, 2 Bur. 1053; the *Exminster*, 12 A. & E. 2 (E. C. L. R. vol. 40); *Longwood*, 13 Q. B. 116 (E. C. L. R. vol. 66); *Harrogate*, 15 Q. B. 1012 (E. C. L. R. vol. 69); *Manchester*, 17 Q. B. 859 (E. C. L. R. vol. 70); *Badcock*, 6 Q. B. 787 (E. C. L. R. vol. 51).

Sir *F. Kelly* (*Parker* with him), *contra*.—It is not necessary to overrule any case in order to support the judgment given in this; but this judgment could not be reversed without upsetting the Liverpool Case, and other decisions founded thereon. Under the statute of Elizabeth it was an essential condition for the imposition of this rate that there should be a beneficial occupation; but from the time of Anne till now it has been held that no individual had any beneficial occupation, but that the docks were for public purposes. By the decision in the Liverpool Case, tried in 1827, these premises were exempted, and that decision has been recognised by the local Acts referred to in the case, 4 & 5 Vict. c. 30, s. 71; 9 & 10 Vict. c. 109, s. 34; 11 Vict. c. 10, s. 4; 18 & 19 Vict. c. 64, s. 31. Previous decisions ought to be adhered to, and the case of *Crease v. Sawle*, 2 Q. B. 885 (E. C. L. R. vol. 42), is an authority on that point. [BLACKBURN, J.—It is clear that when the Legislature passed these Acts it never intended to upset the Liverpool Case.] He was stopped.

CROMPTON, J.—If it were necessary to decide this case upon an examination of the Liverpool Case decided in 1827, and the cases since that time, I should have wished to have heard further argument; but those decisions have been acquiesced in, the Legislature has acted upon them, and people have been induced to advance their property upon

faith in them and the recognition of them by the Legislature, and I think that previous decisions upon which the Legislature has acted ought to be adhered to; perhaps those decisions are right, but in any case I agree with the observations made by Tindal, C. J., in *Crease v. Sawle*, when speaking of the importance of abiding by previous decisions with respect to the rateability of property, and I am disposed to act upon them. I also think that it is very desirable to preserve uniformity of decision if possible: (*R. v. Chirton*.) In the present case, however, I do not propose to deal with any other property than that now before us. Although from the time of Queen Anne this property had not been rated, an attempt to impose a rate upon it was made in 1808. But in 1827 the case came directly before the Court of King's Bench at about the same time as *Rex v. The Trustees of the River Weaver Navigation*, 7 B. & C. 70, (E. C. L. R. vol. 14), and that Court then decided that this property was not rateable. Legislation, with respect to this property, acquiescing in that decision, has since taken place; and at the present time many millions are advanced on the faith of that acquiescence. We find that by 4 & 5 Vict. c. 30, s. 52, the trustees are empowered to build warehouses on the quays of one of the docks, and to borrow largely on the property; and by the 71st section, warehouses are expressly made subject to all parochial and other rates. That section is strong to show, by implication, that the docks themselves were not regarded by the Legislature as property which was beneficially occupied so as to be subject to the rate. It would be a strange construction of that statute, and one which persons who have advanced their money upon faith in its provisions would be entitled to complain of, that when it expressly provides that the new works are to be rated, the old works were not exempt. In 9 & 10 Vict. c. 109, and through the whole course of this legislation, there is a provision running in effect—"Mind the newly-constructed warehouses are to be rated;" and, to my mind, the implication raised thereby is, that the docks were not to be rated. Where a decision has been thus acquiesced in by the Legislature, it is not competent to a superior Court or to a Court of error to interfere with it. If it be found to be attended with any hardship, that must be left to the Legislature to remedy. I confine my judgment in this case entirely to this particular property.

The rest of the Court concurred.

Judgment affirmed.

DAWES v. HAWKINS. *June 1, 2, and July 6, 1861-(a)*

On an issue raised in an action of trespass, *quare clausum fregit*, whether there was a highway over the plaintiff's land, there was evidence that there had been a highway over adjoining land, which was then, together with the locus in quo, an open common. Furthermore, there was evidence that for many years the highway was obstructed by an enclosure illegally made on such common, and that during twenty years of that period the public had deviated necessarily from the old line of way, by going outside the said enclosure, and over the locus in quo. The track thus made was afterwards stopped up by the occupier of the land building a wall across it; and subsequently the old road was reopened, which during twenty-five years had never been used:

Held, per Erie, C. J., and Byles, J. (dissentiente Williams, J.), that there was no evidence of a dedication of the road over the locus in quo to the public, it having been proved that the deviating track was never used by the public, except when they were shut out from the true ancient highway.

THIS was an action of trespass for breaking and entering certain land of the plaintiff, situate in the parish of Whitewell, in the Isle of Wight, and near to a certain house, land and premises of the defendant, called "The Hermitage," and for pulling down and destroying a wall of the plaintiff; and also for cutting down, damaging, and destroying the trees of the plaintiff, then growing and being in and upon the said land.

For a third plea the defendant pleaded that before and at the time when, &c., there was and of right ought to have been a certain common and public highway into, over, and along the said land of the plaintiff, in which, &c., for all the liege subjects of our lady the Queen, to go, return, pass and repass on foot and with horses and other cattle at all times of the day at their free will and pleasure, wherefore the defendant, being a liege subject of our lady the Queen, and having occasion to use the said way, did, at the said time when, &c., enter into and upon the said land of the plaintiff and along the said highway, then using the same as he lawfully might for the cause aforesaid, and because the said wall in the declaration mentioned had been wrongfully erected, and was then standing in and across the said highway, and obstructing the same, and because the said trees were planted in and upon, and were then and there preventing the convenient use of the said highway, the defendant, in order to remove the said obstructions, and to be enabled to pass and repass along the said highways, did necessarily pull down the said wall, and also remove the said trees from the said highway, doing no unnecessary damage, &c. Issue thereon.

At the trial before Martin, B., at Winchester, at the last spring assizes, it appeared that there had always been from the time of legal memory a highway running from the village of Whitewell to the village of Chale, in the Isle of Wight, and that the highway passed over what was formerly a common or down land, belonging to a Sir Richard Worsley, and afterwards to the Baroness de Villars. About 1809 or 1818 a Mr. Michael Hoy, who was the owner of adjoining property, called the Hermitage, enclosed a part of the common, including a portion of such highway; and afterwards down to the year 1832 the public passing along the highway deviated in consequence of such enclosure to the south side of it, and went over that part of the common which subsequently became the plaintiff's garden, and for the alleged trespass on which the present action was brought. No objection appears to have

been ever made to this encroachment by Mr. Michael Hoy. In 1832 the Hermitage became the property of Mr. Barlow Hoy, who made some plantations to the east of Michael Hoy's enclosure, which still further stopped the highway; and he formed a new road going towards the south-west, and away from any part of the land which was the subject of this action. This new road was adopted as a substitution for the old road, and from that time, viz., 1832 to 1857, the old road was altogether abandoned. The plaintiff purchased in 1844 from the Baroness de Villars the land on which he erected the garden wall mentioned in the declaration, and which land had been the downland on the south side of and adjoining to Michael Hoy's enclosure. At the same time the trustees of Mr. Barlow Hoy purchased from the Baroness de Villars the land which had been so previously enclosed by Mr. Michael Hoy. In 1857 the defendant bought the Hermitage from the representative of the late Mr. Barlow Hoy, and at the same time the old road through this property, including the enclosure made by Mr. Michael Hoy, was opened by the public, and the defendant received an allowance out of the purchase-money for the Hermitage, as a compensation in respect of such right of way. It was disputed, however, by the defendant, at the trial, that the right of way for which the compensation was paid him, was the one which went through such enclosure, and it was also contended on his behalf that, whether the old road ever existed or not was immaterial, as the public had used the way over the plaintiff's land and across that part where the garden wall in question had been built for twenty years, so that even if the old road had existed, the public had gained a new road across this place of the plaintiff.

The learned Judge expressed as his opinion that if for convenience a public road was diverted and taken a little to the side of the old road, the public would have a right to use the new substituted road so long as the old one remained closed up, but that if the public insisted on the old road being opened, it would then become the true road, and the obligation of the parish to repair would attach to the old road, and not to the new one; and his Lordship left it to the jury to say whether they believed from the evidence before them the old road ran through the enclosure and plantation made by the Hoyes, telling the jury that if such was the case, the consequence would be that there was no road where the plaintiff's garden wall had been built, and the defendant would be guilty of a trespass in pulling it down.

The jury found a verdict for the plaintiff.

A rule nisi having been obtained, calling on the plaintiff to show cause why the verdict found for him on the trial of the cause at the last assizes holden in and for the county of Hants, should not be set aside, and a new trial be had between the said parties on the ground that the Judge presiding at the trial misdirected the jury in telling them that as a matter of law two parallel public roads running to the same point could not exist together, as a parish could not be compelled or called upon to repair both such roads; and that the Judge did not leave the facts proved and necessary to enable the jury, as a matter of fact, to find whether the locus in quo was a highway or not.

*M. Smith and Karlake* showed cause.

*F. Edwards, Carter, and Kingdon* supported the rule.

*Cur. adv. vult.*

ERLE, C. J. (read by Byles, J.)—On this rule the question was whether there had been a misdirection at the trial. The issue was, whether a highway over the plaintiff's land had existed. Some highway was admitted, but the dispute was whether the line of that way was on the plaintiff's or the defendant's side of the roadway separating the lands of these parties. At the close of the evidence the defendant's counsel contended that, even if the line of highway was found to be on the plaintiff's land, still there was evidence from which the jury might find that there was also an additional parallel pathway running on the defendant's land. The learned Judge in substance directed the jury that there was no such evidence, and this was the misdirection complained of. The question is whether there was any such evidence. It was shown that a highway for horses passed over land which was the property of Lady Villars, and those under whom she claimed, and the land was divided into two parcels, and at the southern part of the property, where the common was open, the line of way was very near the boundary between the two parcels; and it was found by the jury to have been on the defendant's side of that boundary down to 1809, and all the common was open, and the line of roadway must be taken to have been as found by the jury. There was no obstacle to prevent persons passing in any way they pleased over the waste. Between 1809 and 1813, Mr. Hoy, without excuse as against the public, and without lawful right as against the owner of the soil, and without notice, as appears by the evidence in the case, enclosed a part of the common with a ditch, and included in this enclosure the line of way for more than 100 yards; and after this enclosure, down to 1832, persons using the way, on arriving at the enclosure, deviated and were directed by a line of way a few yards to the south, and so passed along the southern side of the enclosure, and returned by a line of way running a few yards towards the north, at the other end, so that the deviation began at the obstruction, and therefore travellers who were thus directed passed over what was the line of enclosure, which became afterwards the line of deviation between the plaintiff's and defendant's land, and these travellers passed on the plaintiff's land. There was evidence that the line of deviation continued only till 1832, when the open common was planted, and a way laid out further to the south, and altogether away from the place in question. In 1857 the obstruction was removed, and the original line of way over the defendant's land was re-opened; and it remains to be seen whether, under these circumstances, there is any evidence that the line over the plaintiff's land had also become a highway, and was dedicated by the owner of the soil, and used by the public for a highway. Express evidence of the dedication by the owner of the soil there was none; and there seems to be no analogy to the case where the owner of the soil of a highway shuts it up and puts down a substituted highway in lieu thereof, which may be express evidence of intention to give the public some right, absolute or otherwise, over the substituted way. Then, was there any evidence of user from which the jury might reasonably infer dedication? The parties who passed that way intended to use the original highway, and probably deviated without knowing it; if they so deviated by reason of the obstruction, and the user of the line of deviation was a user of the highway, is that sufficient to make the user of the highway, as of right, a user of the deviation on the adjoining land by reason of the highway

being so diverted? I know of no decision and no principle making a distinction between land impassable by nonfeasance or the neglect to repair, and land impassable by misfeasance by putting an obstruction upon it. But even if the deviation be a trespass, and would not be justifiable, still, in either case, would the user of right of the line of deviation be evidence of the exercise of a user of the line of highway? If the user of the line of deviation is not a user of the highway, then the user of the line of deviation for twenty years would not alter the nature of the act. If the first traveller passing did not use the highway, neither did the second. According to this view, the Judge was right in directing the jury that there was no reasonable evidence in support of the defendant's contention, and I have taken this to be the effect of the summing up. In the argument, much stress was laid on the observations made by the learned Judge relating to the right of the public where a highway had been stopped up by the owner of the soil, and a new way in substitution set out by him, and afterwards the original highway reopened. I do not discuss these observations nor the arguments relating to them, for I consider the case to have been rightly disposed of by telling the jury that there was no reasonable evidence before them on these facts of the way in question.

WILLIAMS, J.—I regret that I cannot quite concur with my Lord in the judgment which he has given in this case. I think there was some evidence of the dedication of a way over the plaintiff's land used by the public during the time the old highway was obstructed. That user lasted for nearly twenty years, at least; and some of the witnesses described the deviation as having been for that line of road. It is incontrovertible that, if this uninterrupted enjoyment by the public had stood alone, it would have afforded some evidence from which the jury might have inferred an intention, on the part of the owner of the soil—whoever he might be—to dedicate the way to the public. But in the present case, it is said that no such intention can be inferred, because the user may be accounted for by the circumstance that the adjoining way, by which the public had a right to travel, had been wrongfully enclosed and obstructed, that the deviation was not a trespass, but had been done in the exercise of a public right of going on the adjacent ground when the common highway has become impassable. It is remarkable that, in the text-books, that right is confined to cases where a highway is foundrous and out of repair: 2 Saund. 160 B., note 12, and *Rex v. Stoughton*, 4 Russell on Crimes 34; 2 Smith's L. Cas. 119, 4th edit., note to *Dovaston v. Payne*; and on principle it may be doubtful whether the burden to which the adjacent soil is subjected when the parish has been guilty of a nonfeasance in respect of the non-repair of a highway ought to be likewise inflicted, because some wrongdoer has put an obstruction on the highway, which may be abated as a nuisance by any one who has occasion to use the road, unless the obstruction be of such a nature that it practically cannot be abated, and so the road is in effect impassable. However, in the case of *Absor v. French*, 2 Show. 28, it seems to have been held a good plea in an action of trespass where the plaintiff himself stopped a highway, so as that the defendant could not pass, that therefore he went over the plaintiff's close, doing as little damage as he could. But even supposing the right exists of only going on the adjacent soil along the highway obstructed, still, if the owner of the soil for

a great many years submitted to such a burden, instead of causing the obstruction to be removed, this would afford some evidence of intention to dedicate the substituted road to the public. It does not appear to have been distinctly shown who was the owner of the soil during the public use of it, whether it was the same person who obstructed the old highway or somebody adjacent. The law is clear, if there had been of right such a public, uninterrupted user of the road for such a length of time so as to satisfy the jury that the owner of the soil, whoever he might be, intended to dedicate it to the public, this is sufficient to show the existence of the highway, though it cannot be ascertained why, during the same period, it has been so used by the public. If the soil over which the road passed in the present case had been made a road open, and the same person who made the enclosure had obstructed thereby the old highway, I think it plain that he intended dedication, because I apprehend he must surely be deemed to have been aware that the enclosure should always be over it, that the public should be deprived of the old road, and in lieu thereof have the substituted one. If the soil belonged to the owner of the land, Lady Villars, her acquiescence in the existence of the enclosure which necessarily stopped the old highway, coupled with the uninterrupted continuance of the public user of the substituted road, afforded evidence which ought to have been laid before the jury of an intention on her part to dedicate. The effect of this evidence was certainly much weakened by the circumstance that, after the substituted road had been used by the public for nearly twenty years up to 1832, the use of it was destroyed by reason of the new way having been laid out in a different direction. But if, having regard to all the circumstances of the case, the jury had thought fit to negative any intention to dedicate, I should have approved of their verdict; and though I do not at all regret that my learned brethren should have come to the conclusion that there ought to be no new trial in this case, at the same time I think it is of such importance to adhere to what I conceive to be the law as to the evidence of dedication of a highway, that I think it my duty to express my opinion for the reasons above stated, that there was some evidence of it in the present case. As it appears to the majority of the Court, however, that the effect of the summing up was to direct the jury that there was no reasonable evidence of that given at the trial, and as it likewise appears to them that this direction was right, the rule must be discharged. I abstain, as my Lord has done, from expressing any opinion on the other points raised on the rule.

BYLES, J.—I think the direction of the learned Judge was substantially correct. It amounts to this: that at the time in question, that is to say, after the old road had been reopened, the alleged new road did not exist; indeed, I conceive there is no evidence to be submitted to the jury that the alleged new road ever had existed. It is clear that there can be no dedication of a way to the public for a limited time, certain or uncertain; if dedicated at all, it must be dedicated in perpetuity—and it is also an established maxim, once a highway, always a highway for the public. Therefore, unless that limits it, there is no distinct presumption of prescription. The only methods of legally stopping a highway are by *mandamus* or *ad quod damnum*, and proceeding before the magistrates under the statute. The true question therefore seems to be this, Was there any evidence of the alleged dedication of

the way to the public by the owner of the soil? I collect from the evidence that the material facts were these:—The road was an ancient and undoubted highway, and was illegally stopped about the year 1813. The old road being stopped, the public in consequence deviated on the adjoining land, which was open down, traversing over various parts of the down, but the principal tracks were nearly parallel with the old road; the ownership of the soil of the old and the new road was in the same person. About 1832 the principal track, called at the trial the “new road,” was stopped up by the occupier of the land building a wall across the track; but in the year 1857 the old road was reopened, which for those twenty-five years had never been used. The contention of the defendant at the trial and since was, that the principal track of deviation was no deviation at all, but was the true ancient road. Upon that contention the jury decided against him; but the learned counsel for the defendant, in his summing up to the jury, for the first time raised the point that the deviated road, even if not the ancient road, had been dedicated to the public, and had been a public highway, even as the old one. The facts, as above stated, do not appear to me to amount to any reasonable evidence of a dedication to the public. It was proved that the public had never used the deviating track except when they were shut out from the true ancient highway; the public user was therefore lawful, and of right, when the public so deviated on the adjoining land: see *Absor v. French*, 2 Shower. And it further appears that the deviation was not confined to a single defined track, but the right was occasionally exercised all over the down. It is difficult to suppose that the owner of the soil could have assented to such a dedication. Lastly, the deviating track has been shut up and disused for twenty years. These facts seem to me very consistent with the public right of user of the deviation during the temporary obstruction of the old road, and inconsistent with a dedication to the public of the new way. The new road and the old road were parallel, the old road still continuing to exist in point of law. But assuming the facts to be as consistent with the defendant's hypothesis as with the plaintiff's hypothesis, there is still no balance of probability in favour of the defendant's hypothesis; and, if that be so, the burden of proof lying on the defendant, there is no evidence to be left to the jury. Lastly, assuming some evidence of the new road to exist, it is at most such a scintilla of evidence that if the jury had found a verdict for the defendant upon it, that verdict would have been set aside: see the observations of the Exchequer Chamber in *Avery v. Bowden*, 6 E. & B. 972 (E. C. L. R. vol. 88). For these reasons I am of opinion that the rule for a new trial should be discharged. The rule in this case will be discharged. Rule discharged.

Attorneys for plaintiff, *Harrison and Lewis*.

Attorney for defendant, *Burn*.

**Ex parte LLYNFI VALLEY RAILWAY COMPANY v. BROGDEN.** *June 11 and 12 and Nov. 5.(a)*

Where the question raised by the rule is whether an arbitrator has exceeded his authority by awarding compensation in respect of a claim for damage not within the submission to reference, the Court will look to the facts, and where no excess of authority is proved will discharge the rule.

*Seemle*, the award is not necessarily bad because the arbitrator has given compensation for contingent damages.

THIS was a rule calling upon J. Brogden and others to show cause why an award should not be set aside on the grounds that the umpire included compensation for the power to abandon and possible future abandonment of a tramway, and that that appeared on the face of the said award, or ought to have been so stated by the said umpire; that the power to abandon the tramway was not the subject of compensation at the time of the submission, and the said umpire had exceeded his powers with respect to compensation for the power to abandon the tramway; that the abandonment of the tramway would not give Messrs. Brogden & Co. a right to claim, or the umpire to award compensation; that at all events compensation could not be awarded until the tramway was abandoned and injury sustained thereby.

The award and the facts appearing upon the affidavits are sufficiently stated in the judgment of the Court.

*Lush*, Q. C., and *Kemplay* showed cause.—You are bound at once to ask and receive all the compensation you are entitled to under the Lands Clauses Consolidation Act, and the arbitrator must take into consideration future damage which may be foreseen. But it was not optional with the Company to abandon the line of the tramway; it was part of the scheme that a portion of it should be abandoned, and the damage caused by such abandonment was rightly taken into account by the arbitrator: *Russell on Arbitrations*, 2d edit. 302; *Fuller v. Fenwick*, 3 C. B. 705 (E. C. L. R. vol. 54); *Hodgkinson v. Fernie*, 4 C. B. 66 (E. C. L. R. vol. 56).

*Bovill*, Q. C., and *Karslake*, in support of the rule.—It must be assumed that there is no compulsion, though there is a power to abandon the line of railway. Secondly, that there is no power given to the arbitrator to assess damages as to the other line or railway as he has done. The question as to the tramway is distinct from that of the railway. The question there is, can the arbitrator give himself jurisdiction to do what he has here done? He has taken into consideration that which he ought not to have taken. Counsel for the Company protested against the jurisdiction of the arbitrator, but he determined to receive evidence of abandonment of the old line of railway, and he awarded compensation on the assumption that the line was to be abandoned. [ERLE, C. J.—When an arbitrator has made his award, it is, in my opinion, a breach of duty in him to say any more. I have known many awards unsatisfactorily set aside because the arbitrator had chosen to say something more than he need say.] As a matter of fact, it cannot be doubted that the arbitrator has taken into consideration this claim; how then can the Court, sitting as a jury, say it is not so? *The New River Company v. Johnson*, 29 L. J. 93, Mag. Cas.; *Penny v. The*

South Eastern Railway, 7 E. & B. 660 (E. C. L. R. vol. 90). Is this award good on the face of it? It is not; giving, as it does, compensation "for damage sustained and which may be sustained" by reason of the works." The damages to be considered by the arbitrator are such as are capable of being estimated at the time of the arbitration, not such as may thereafter be sustained, for such must be speculative damages. They cited *Jubb v. The Hull Dock Company*, 9 Q. B. 443 (E. C. L. R. vol. 58); *Regina v. The South Wales Railway Company*, 18 Q. B. 988 (E. C. L. R. vol. 66); *Re Chabot*, 15 Q. B. 446 (E. C. L. R. vol. 69); *Regina v. The London and North Western Railway Company*, 3 E. & B. 443 (E. C. L. R. vol. 77). The Court, under the 37th section of the Lands Clauses Consolidation Act, the effect of which is the same as the 145th section, clearly have jurisdiction over this case.

*Cur. adv. vult.*

ERLE, C. J., now delivered judgment.—On this rule the question is, whether the arbitrator has exceeded his jurisdiction by awarding compensation in respect of a claim for damage not within the reference. From the affidavits in support of the application, it appeared that before and in 1855 the claimants for compensation, as occupiers of the Ton-ddu works, had the use of two public tramways for horse-power, with a narrow gauge, one from Porth Cawl, and the other from Bridgend to Porth Cawl. That in 1855 an Act passed empowering a new Company to construct a railway for steam-power with broad gauge, nearly in the course of the two tramways of the railway above mentioned, granting the option of abandoning those tramways, subject to an exception to part with one of them in favour of the claimants. Under this Act the Company gave the proper notices for taking parcels of land belonging to the claimants, and, as the parties did not agree, an umpire was appointed, according to the provisions of the Lands Clauses Act, who awarded that the Company should pay to the claimants 7300*l.* as and for the purchase-money, and compensation for and in respect of their interest in the said lands, and for the damage sustained and which may be sustained by them by reason of the execution of the works of the said railway, or the exercise by the said Company of the powers of the said Acts, and he declared that he gave 150*l.* for the purchase of one part of the land, and 200*l.* for the purchase of the other part. The reference was in the usual form to ascertain the amount of the compensation to be paid for the interest in the lands, and for any damage that may be sustained by reason of the execution of the works. The affidavits show that the claimants by their counsel and witnesses claim to be compensated for a supposed loss which would be sustained if each of the two tramways above mentioned were abandoned according to the option given by the Act, and the award indicated the same result as if it gave compensation for the land, and for damage from the completion of the works, or exercise of the powers of the Act. On these grounds the Company contended that the umpire had exceeded the authority given to him by the reference, by giving compensation for a damage which was contingent and might never arise, and which was not so connected with the land to be taken and the works to be executed thereon as to be within the reference. In answer to this, the claimants denied that any excess of authority appeared. They showed, by referring to the plans on which the umpire was to act, that in the execution of the

proposed works a considerable part of the old tramway, from Bridgend to Porth Cawl, would in fact be absorbed into the new railway; that this would be the case on the part of the lands of the claimants to be taken by the Company, and that the change of level, and of the gauge, and of traction from horse to steam, would prevent the claimants from being able to use the railway as they had used the tramway, without great expense, and it would make this private tramway, forming a public junction, useless. The affidavits also show that the damage by severance would be considerable, as the furnaces would be severed in part from the cinder heaps, and in part from the coal-mines on the works. Upon these facts we have come to the conclusion that no excess of authority is proved, and therefore the objection to the award is not supported. The affidavits show that the umpire had a right to infer that the execution of the proposed works on the lands of the claimants would render the use of one of the tramways impracticable, if not impossible. If he did so infer, it was his duty to give compensation in respect of the loss of this part of the tramway, and if any other part of the tramway should be continued by the Company, still there was ground to infer that the value of it to the claimants would have been so depreciated by the works as to entitle him to substantial compensation in respect of that part also. Our judgment proceeds on this view of the effect of the affidavits; but we ought to add that, in so limiting it, we do not intend to sanction the argument that the award would have been bad if the umpire had given the compensation for contingent damages which the Company alleged.

Rule discharged with costs.

## IN THE EXCHEQUER CHAMBER.

### TRINITY VACATION.(a)

#### DENDY *v.* SIMPSON. *June 15.(b)*

The ordinary presumption is, that strips of land lying along a highway, even though indirectly connected with parts of the waste, belong to the owner of the adjacent enclosed land between which and the actual beaten road they lie, and not to the lord of the manor, especially if the adjacent owner has done acts of ownership without interruption upon the land.

Such strips of land might well pass under a conveyance of the adjacent enclosure, though the deed purported to state the quantity of acres, within the fences, that were therein passed, if it had the words "more or less" added.

THIS was a proceeding in error on a decision of the Court of Common Pleas in Easter Term, 1860, in favour of the plaintiff below, Simpson. (See 6 Jur. N. S. 1197, 8 C. B. N. S. 433, where the facts, documents, &c., are fully stated and set out.)

*Manisty*, Q. C. (with him *T. Jones* and *Yorke*), for Dendy, the plaintiff in error.—The question, whether the lord of this manor of Hendon is entitled to the ownership of certain strips of land near Hall lane, lying between the two fields which are designated in the map—all

(a) Before Pollock, C. B., Wightman, Crompton, and Blackburn, Js., and Bramwell and Wilde, Bs.

(b) 7 Jur. N. S. 1058.

this land having been, in the year 1754, in the hands of one person. There was some evidence of enjoyment, but of an extremely vague character. A tenant of Chamberlain's field, it was shown, had used this piece of land by laying manure on it, and keeping the manure there for two years together; and there was also evidence that some gipsies had encamped there; but it was open, like the rest of the waste; and there was evidence of a custom in the manor for the lord to grant copyholds out of this piece of waste. As to cutting down the oak tree, which in the judgment of the Court below is made use of, it is nothing to the purpose, because it was cut down by the owner of the adjacent field. That, therefore, is no evidence at all for this purpose. [CROMPTON, J.—I do not think that a strong part of the case at all.] It is submitted that the usual presumption respecting the ownership of the adjoining landowners does not arise in this case: for what is the foundation of that presumption? The answer is, that it is conceived that the owners in former times may each have given up a portion of land for the formation of the road. That is the basis of the presumption. But if you can lay your finger on a time within living memory at which the lands on both sides, and the lane also, were in the same hands, and if, upon a sale of the property, the field on one side fell to A., and the field on the other side fell to B., then the lane, and the strips of land contiguous to it, would remain in the vendor: *White v. Hill*, 9 Jur. 129; *Doe d. Pring v. Pearsey*, 7 B. & C. 304 (E. C. L. R. vol. 14). At least, the vendor would retain the soil of the road, if there was no plan to show the contrary. The evidence of the custom for the lord of the manor, with consent of the homage, to grant copyholds out of these strips of land, was strong to show that he never meant to pass away the property in the soil of them when he conveyed these fields. [BLACKBURN, J.—Is not the effect of the words “abutting on the road,” which are used in the description of the parcels, *prima facie* to convey the land *ad medium filum viæ*?] That might possibly be so if the words stood alone; but here is a plan; and according to *Llewellyn v. The Earl of Jersey*, 11 M. & W. 183,† the law is, in such case, that the plan governs the deed; and the plan here shows that it was not meant to pass the property in these strips.

*Huddleston*, Q. C. (*Millar* with him), who appeared for Mrs. Simpson, were not called upon.

POLLOCK, C. B.—This is much more a matter of fact than of law. I doubt very much whether there can be an appeal on a matter of fact; and, at any rate, unless there is something very strong to the contrary, we ought to affirm the verdict for Simpson. We are, therefore, all of opinion that the judgment of the Court below must be affirmed.

Judgment affirmed.

# INDEX

TO

## THE PRINCIPAL MATTERS.

(The additional cases in this volume are indexed in [ ].)

*Willaspie*

### ABBEY LANDS ACT.

*Construction of.*

1. By a local Act (7 & 8 G. 4, c. cviii.), called The Abbey Lands Act, the owners and occupiers of lands in the district are empowered (by s. 13) to rate the owners and occupiers of abbey lands, for the purpose of raising funds for the repair of certain bridges. By s. 15, it is enacted, that, if any owner or occupier of any land in respect of which a rate has been imposed by virtue of the Act, shall refuse to pay the same, a justice, on proof of demand, may summon, and on due proof issue a distress-warrant. By subsequent sections, an appeal is given to any person claiming exemption, on the ground that the lands rated are not abbey lands; and the decision of the quarter sessions on such appeal is final.

The plaintiff having been rated in respect of lands which the jury found not to be abbey lands, and having refused to pay upon summons, D. a magistrate issued a distress-warrant, under which his goods were seized:—Held, that D. was not protected by Jervis's Act, 11 & 12 Vict. c. 44, s. 1, or by a similar clause in the local Act. *Pedley v. Davis*, 492

2. But, held, that the "collector of the abbey lands rate," to whom the distress-warrant was directed, was an "officer" within the meaning of the 24 G. 2, c. 44, s. 6. *Id.*

### ACKNOWLEDGMENT.

*Of Deed by Married Woman,—See HUSBAND AND WIFE, 1—3.*

### ACQUIESCENCE.

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### ADMITTANCE.

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### ADULTERY.

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### AFFIDAVIT.

*Of Due Taking an Acknowledgment abroad,—See HUSBAND AND WIFE, 3.*

### AGENT.

*Occupation of Premises as,—See LANDLORD AND TENANT, 1.*

### AGREEMENT.

*Sufficiency of Consideration.*

The second count of the declaration stated, that, in consideration that the plaintiff then agreed with the defendant to sell and transfer to him by the 22d of January then next the lease of a farm for 500*l.*, and the implements, stock, &c., at a valuation to be thereafter made, the defendant agreed to purchase the same upon the terms aforesaid, subject to his being approved of as a tenant by Lord S., and also, among other things, then at and upon the making of the agreement to pay down to the plaintiff 500*l.* as a deposit, and to complete the purchase and pay the amount of the valuation by the said 22d of January; that, the defendant being

unable to pay the 500*l.* at and upon the making of the said agreement, in consideration that the plaintiff, at the request of the defendant, dispensed with the said payment down of the 500*l.* and would take the defendant's I. O. U. for the same, the defendant promised the plaintiff that he would pay him the 500*l.* as soon as he could write to his banker at Berwick and procure his said banker to remit the same: General averment, and breach that the 500*l.* was not paid:—Held, that the count disclosed a sufficient consideration for the defendant's promise. *Davis v. Nisbett*, 752

[*Performance prevented by Act of other Party.*

See BAILMENT.]

AIR.

See EASEMENT.

ALEHOUSE.

See LICENSED VICTUALLER.

APPEAL.

*From Decisions of Justices.*

A refusal by justices to make an order for the disallowance of a particular item in the accounts of a surveyor of highways, is ground for an appeal under the 20 & 21 Vict. c. 43. *Townsend, app., Read, resp.*, 308

ARBITRAMENT.

*Authority and Jurisdiction of Arbitrator.*

The plaintiff had effected three policies on goods,—one for 6000*l.* with the A. Company, another for 2500*l.* with the B. Company, and a third for 2500*l.* with the C. Company. A fire having happened, the plaintiff's claims against these three Companies were referred to arbitration. The agreement of reference recited that the plaintiff had claimed to have made good by the several Companies parties thereto or some of them the loss thereby sustained to the chattels and things insured, so far as the said loss was covered by the policies or any of them, and that four schedules, severally marked A, B, C, and C a, contained the particulars of all the chattels and things alleged by the plaintiff to have been covered by the said policies or some or one of them, and to have been destroyed or injured by the fire. It further recited that "it had been agreed between the said parties thereto that the claim of the plaintiff, so far as respected the chattels and things particularized in Schedule A, should be satisfied by means of the payment to him of a sum of 2771*l.* 19*s.* 5*d.*, such sum being the agreed value at the time of the occurrence of the fire of the last-mentioned chattels and things, as the plaintiff did thereby admit." It further recited that difficulties had arisen respecting

the settlement of the said claim of the plaintiff so far as the same had not been agreed to be satisfied as aforesaid, and respecting the adjustment of the respective liabilities of the said Companies as between or among themselves to the total loss covered by the said policies. It then proceeded to refer it to the arbitrators "to award and determine what was the total sum of money which ought to be paid to the plaintiff under or by virtue of the said policies, or any of them, in respect of loss or damage occasioned by the said fire to or in the said chattels or things particularized as aforesaid in schedules B, C, and C a, and what were the several proportions in which such total sum, and also the said sum of 2771*l.* 19*s.* 5*d.* agreed to be paid as aforesaid, ought to be borne and paid among or between the several companies."

The arbitrators by their award found that 8288*l.* 0*s.* 7*d.* was the total sum of money which ought to be paid to the plaintiff under or by virtue of the said three policies, in respect of loss or damage occasioned by the fire to the chattels and things particularized in schedules B, C, and C a; and they directed that this sum of 8288*l.* 0*s.* 7*d.* and the 2771*l.* 19*s.* 5*d.* so agreed to be paid to the plaintiff in satisfaction of his claim in respect of the loss or damage occasioned by the fire to the chattels and things particularized in schedule A,—making together 11,000*l.*, should be borne and paid by the three Companies in certain proportions. They then found that the loss or damage sustained exceeded the sums insured, and that *the whole salvage and proceeds of the salvage of and from the said fire belonged absolutely to the plaintiff*:—

Held, that, in awarding that the plaintiff was entitled to the salvage,—which it appeared from the record arose solely from the goods particularized in schedule A,—the arbitrators had exceeded their jurisdiction. *Skipper v. Grant*, 237

[*Rule to set aside Award.*

2. Where the question raised by the rule is whether an arbitrator has exceeded his authority by awarding compensation in respect of a claim for damage not within the submission to reference, the Court will look to the facts, and where no excess of authority is proved will discharge the rule.

*Semble*, the award is not necessarily bad because the arbitrator has given compensation for contingent damages. *Ex parte Llynfi Valley Railway Company v. Brogden*, 861]

*Compulsory Reference, under the Common Law Procedure Act, 1854.*

3. *Authority of master.*—A reference under the Common Law Procedure Act, 1854, confers upon the master the same powers and imposes upon the parties the same liabilities as in the case of a reference under an ordi-

nary submission or rule or order. *Baggalay v. Borthwick*, 61

4. *Remitting for reconsideration.*—Therefore the Court will not remit the matter to the master for reconsideration, except where there is ground for setting aside his certificate. *Id.*

5. *Stating case for the Court.*—Nor will they, where the master has declined to state a case for the opinion of the Court under s. 5, remit the matter to him, in order to give one of the parties an opportunity of applying to the Court to direct a case to be stated under s. 4. *Id.*

## [ASSUMPSIT.

*For Work and Labour.*

The defendant employed the plaintiffs to find a purchaser or mortgagee of an estate. Thereupon the plaintiffs went down to the estate, valued it, put it in their books, advertised it in their circulars and in newspapers, and took some journeys and had communications about it, and ultimately, while negotiating with one N. upon the matter, the plaintiffs and the defendant agreed that a letter should be written by the plaintiffs to N. and that if such letter induced N. to become purchaser or mortgagee the plaintiffs should be paid 100%. N. ultimately became mortgagee, but denied that he was influenced in any way by the letter:—Held, that the plaintiffs could not recover on a quantum meruit on the common counts for work and labour, &c., with particulars claiming commission as agreed.

*Semble*—That they could not recover at all. *Green v. Mules*, 868]

## BAIL IN ERROR.

*See ERROR.*

## [BAILMENT.

*Effect of Mortgage by Bailor on the Contract.*

Where one of two contracting parties so conducts himself as to hinder the performance of the contract by the other, or to subject the latter to an action at the suit of some third person if he duly perform the contract, no action will lie for the non-performance.

When a bailor mortgages the chattel bailed, and the mortgagee has a right to demand possession from the bailee and does demand it, the bailee may refuse to give the chattel up to the bailor.

The plaintiffs delivered a ship to the defendants under a contract, which provided, among other things, that the defendants should during the continuance of the contract and while the ship remained in the possession and use of the defendants, pay and discharge certain claims which would arise against the owners of the ship for its expenses, and upon the determination thereof redeliver the ship to the plaintiffs. The

plaintiffs afterwards mortgaged the ship, and certain expenses were incurred within the above provision, and after that the mortgagees demanded possession under their mortgage:—Held, first, that such mortgage and demand were an answer to the claim of the plaintiffs to have the ship redelivered to them; but, secondly, were no answer to their claim to have the expenses paid. *The European and Australian Royal Mail Company (Limited) v. The Royal Mail Steam-Packet Company*, 860]

## BANKER.

*Custom as to Presentment of Checks on Country Bankers,—See CHECK.*

## BANKRUPT.

*Action upon a Judgment against one who has obtained Protection under the 12 & 13 Vict. c. 106, s. 211.*

The defendant, in August, 1860, presented a petition to the Court of Bankruptcy under the 211th section of the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), and obtained the usual order for the protection of his person and property from all process until further order,—which protection was from time to time renewed until the 5th of June, 1861, and his proposal (to pay 10s. in the pound by certain instalments) was assented to by the requisite number of creditors, and approved and confirmed by the commissioner. On the 5th of March and 4th of April, 1861, the plaintiffs obtained two judgments against the defendant; and on the 21st of April, 1861 (and whilst his protection was in force), they commenced an action against him upon those judgments:—The Court refused to stay the proceedings therein. *Naylor v. Mortimore*, 566

*What Choses in Action of the Wife pass to the Assignees of the Husband,—See HUSBAND AND WIFE, 4—6.*

## BARON AND FEME.

*See HUSBAND AND WIFE.*

## BILL OF EXCHANGE.

*Authority to Endorse.*

A bill drawn payable to A. B. or order is not transferable without the endorsement of the payee: and an authority from him to one to whom he delivers the bill, to endorse it in his name, is not to be inferred from the mere act of delivery. *Harrop, app., Fisher, resp.*, 196

## BILL OF LADING.

*Liability of Assignee.*

1. *For freight.*—By a charter-party which was negotiated by A. as agent of B., the char-

terer (B.) engaged to pay a lump freight of 735*l.* for a voyage to the coast of Africa and back to London, payable in cash on correct delivery of the return cargo: and the charter-party contained the following clause,—“The master to sign bills of lading at any rate of freight, without prejudice to this charter.” B., the charterer, shipped certain oil on his own account for London, for which the master signed a bill of lading making the oil deliverable to A. or assigns, “he or they paying freight for the said goods as usual.” This bill of lading B. endorsed to A. in part payment of advances made by him on the purchase of the outward cargo:—Held, that,—A. having notice of the terms of the charter-party,—the owner was entitled to a lien on the oil for the entire charter freight. *Kern v. Deslandes*, 205

2. *For demurrage.*—A cargo of potatoes was shipped from Dunkirk to London under a charter-party by which the charterer contracted to pay certain freight, and was to have sixteen days for loading and unloading, and to pay 2*l.* per day for any detention of the vessel beyond that period. By the bill of lading, the cargo was deliverable to the consignees in London, or order, “he or they paying freight as per charter-party.” In the margin of the bill of lading was the following memorandum—“There are eight working days for unloading in London:”—

Held, that the consignees, by accepting the cargo under this bill of lading, incurred no liability for demurrage, although the vessel was detained for four days beyond the time mentioned. *Chappel v. Comfort*, 802

#### [BROKER.]

*Right to Compensation,—See ASSUMPSIT.*

#### CAMBRIDGE CHARTER.

##### *Construction of.*

1. A judicial officer is not liable to be sued for an adjudication according to the best of his judgment upon a matter within his jurisdiction: and a matter of fact so adjudicated by him cannot be put in issue in an action against him. *Kemp v. Neville*, 523
2. To an action against the vice-chancellor of the university of Cambridge for assaulting the plaintiff, a young female, and imprisoning her in a place called the Spinning House, and compelling her to take off her clothes and put on a prison dress,—the defendant pleaded, that, the proctors of the university, acting under the authority of the charter of the university (confirmed by Act of Parliament), having, upon a certain scrutiny, search, and inquiry in the town and suburbs of Cambridge, found the plaintiff and divers other women assembled together in a certain carriage in company with certain scholars of the university, in a certain pub-

lic street in the said town, and then reasonably suspecting the plaintiff of evil, that is to say, of being in company with the said scholars for idle, disorderly, and immoral purposes, had as officers of the university, and by command of the chancellor, &c., arrested and apprehended the plaintiff, and brought her before the defendant, then being the vice-chancellor of the university, in order for her examination touching and concerning the premises: whereupon the defendant did then and there examine the plaintiff, and was thereupon satisfied of the matters aforesaid, and that the plaintiff had so been in company with the said scholars for idle, disorderly, and immoral purposes, wherefore the defendant caused the plaintiff to be punished by the imprisonment of her body for a reasonable time in that behalf, to wit, &c., in the place in the declaration mentioned, being a fit and proper and convenient place in that behalf; and that the compelling the plaintiff to take off her clothes, &c., was part of the reasonable discipline of the said place of confinement then usual, &c.

By the charter, which was put in, the chancellor, &c., of the university were empowered “per seipsos, aut per eorum deputatos, officarios, servientes, et ministros, seu per eorum aliquem sive aliquos, de tempore in tempus ad omnia tempora, tam in die quam in nocte, ad eorum beneplacitum, ex nunc in perpetuum, ad faciendum scrutinium, scrutationem, et inquisitionem, tam per diem quam per noctem, quotiescunq. et quandocunq. eis videbitur, expedire in predicta villâ Cantebriგიæ, et in suburbis ejusdem, &c., de et pro omnibus et publicis mulieribus, pronubis, ragabondis, et aliis personis de malo suspectis, ad dictam villam et suburbia, ferias, mercatos, nundinas et loca predicta, seu ad eorum aliquem venientes seu confluentes; ac omnes et singulas illas personas quas iidem cancellariis, magistri, et scholares, aut eorum successores, aut eorum deputati, officarii, servientes, et ministri, seu eorum aliqui seu aliquis, super aliquod hujusmodi scrutinium, scrutationem, sive inquisitionem, reas seu suspectas de malo, in venerint puniendi per imprisonamenta corporum suorum, bannitionem, et aliter, prout cancellario dictæ universitatis Cantebriგიæ, aut ejus vicemgerenti pro tempore existenti videbitur punire,” &c.

The plaintiff and several other young women, residents of Cambridge, being found by certain proctors of the university in an omnibus, in the town, in company with certain undergraduates, proceeding to a dance at a village a short distance from Cambridge, took the females to the Spinning-House, the usual place of confinement of the university. The plaintiff was there taken before the defendant (the vice-chancellor), who questioned her as to her residence and occa-

pation, and as to who invited her to the party, &c., and ultimately,—without hearing any evidence upon oath, or making any inquiry about the plaintiff of certain persons to whom she wished to refer, and without any warrant in writing,—committed her to the Spinning-House for fourteen days, where she was deprived of her clothes, and forced to wear the prison dress. It was admitted that the defendant, throughout the proceeding complained of, acted *bonâ fide* and according to the best of his judgment and discretion.

Upon these facts, the following questions were submitted to the jury,—first, whether the proctors and the vice-chancellor had reasonable cause of suspicion that the plaintiff was in company with the undergraduates for idle, disorderly, and immoral purposes,—secondly, whether the vice-chancellor duly heard and examined the plaintiff,—thirdly, whether the place of imprisonment and the treatment of the plaintiff therein were proper and reasonable.

The jury found that the proctors had reasonable cause for suspicion; that the defendant had not made due inquiry into the plaintiff's character, and that the punishment was undeserved; but that the complaint of the prison and the treatment therein was unfounded:—

Held, that, upon this finding, the defendant was entitled to the verdict; for, that, as the charter in express terms invested the vice-chancellor with authority to punish by imprisonment or otherwise as he should think fit, he thereby became invested with judicial authority, and a Judge of a Court of record, and entitled to all the protection attached by law to the judicial office. *Kemp v. Neville*, 523

2. Held also, that the jurisdiction to hear and determine and pass sentence of imprisonment attached when the proctors, being officers of the university, brought before the vice-chancellor for adjudication a person found by them in Cambridge, and apprehended by them as being a person suspected of evil, within the meaning of the charter; and that, as the charter defined no form of proceeding, either for the hearing, or the determination, or the committal, an action of trespass could not be sustained for any of the judicial acts complained of. *Id.*
4. Held also, that, there being no express provision in the charter on the subject, the vice-chancellor was not bound to hear and examine upon oath; and that the absence of a written warrant for the commitment of the plaintiff afforded no cause of action. *Id.*

#### CHARTER-PARTY.

*Construction of*,—See SHIPPING, 1.

#### CHECK.

##### *Time for Presentment.*

1. A country banker receiving from a customer a check for presentment drawn upon another country banker not resident in the same town, is not bound to transmit it for presentment by the post of the day on which he receives it, but has until post-time of the next day for so doing. *Hare v. Henty*, 65
2. A., a banker at Worthing, received from B., a customer, a check drawn upon C., a banker at Lewes (which is distant about eighteen miles from Worthing), on the morning of Friday, the 8th of July, and sent it that evening by post to his London correspondent, D., for presentment through the "country clearing-house," then recently established, but in pretty general use among country bankers. D.'s clerk handed the check at the clearing-house on the morning of Saturday, the 9th, to the clerk of E., the London correspondent of C. (the drawee), who sent it down by the post of that evening to C.:—Held, that the presentment was in due time. *Id.*

#### COLLECTOR OF RATES.

*Protection of*, under 24 G. 2, c. 44, s. 6,—See ABBEY LANDS ACT.

#### COMMITMENT.

##### *Of Witness for Contempt.*

On the trial at the assizes of an information against one C. for bribery alleged to have been committed by him at the election for a member of Parliament, a witness was called on the part of the Crown, who had been examined before a Royal commission appointed to inquire into alleged corrupt practices at that election, and who had received from the commissioners a certificate under the 10th section of the 15 & 16 Vict. c. 57,—indemnifying the witness from "all penal actions, forfeitures, punishments, disabilities, and incapacities, and all criminal prosecutions to which he may have been or may become liable or subject at the suit of Her Majesty, &c., for anything done by him in respect of such corrupt practice,"—and, being asked, "Did you in the month of April, 1859, receive any sum of money from Mr. C.?" declined to answer the question, on the ground that his answer might tend to criminate himself; and, though told by the presiding Judge that the certificate was a complete protection to him, and that he was bound to answer the question, he persisted in his refusal. The Judge thereupon committed him to York Castle for six months, "for having wilfully and in contempt of the Court refused to answer the said question," and further imposed upon him a fine of 500*l.*:—

Held, that, the Court of Assize being a "superior Court," the Judge had jurisdiction to commit and was not bound to set out at length in his warrant the cause of commitment,—his decision not being subject to review by the Court above. *Ex parte Fernandez*, 3

And see CAMBRIDGE CHARTER.

#### COMMON LAW PROCEDURE ACT, 1852.

Section 210. *Ejectment for Forfeiture*,—See EJECTMENT.

#### COMMON LAW PROCEDURE ACT, 1854.

Section 3. *Compulsory Reference*,—See ARBITRAMENT, 2—4.

Section 51. *Interrogatories*,—See INTERROGATORIES.

#### CONDITION.

See SALE, 4.

#### CONDITION PRECEDENT.

*What amounts to.*

The declaration,—after reciting that certain persons intended to apply to parliament for leave to bring in a bill for making and maintaining waterworks, and incorporating a Company for the supply of water,—set out an agreement between the plaintiffs (an engineer and solicitors) and the defendants (contractors), whereby it was agreed that the defendants should be the contractors to do the proposed works, and should provide the parliamentary deposit, and that, in the event of the intended Act not being obtained, the defendants should pay a sum not exceeding 300*l.* toward the expenses in endeavouring to obtain the Act; and that the plaintiffs should not make any charge for work done or money paid against the provisional directors of the intended Company, or beyond the said 300*l.* against the defendants.

Plea, that the plaintiffs, having incurred costs to the amount of 300*l.* in endeavouring to obtain the Act, refused to continue and ceased from continuing such endeavours, on the ground that no one would provide them with funds to pay the counsel's fees, whereupon it became necessary that the bill should be lost for want of further prosecution, or that the defendants should prosecute it; and that the defendants accordingly employed other solicitors for that purpose, and in so doing incurred costs to an amount greatly exceeding 300*l.*, but that the bill was thrown out. The plea concluded with a general averment that all things had happened to entitle the defendants to employ the last-mentioned solicitors, and to make the said payment a performance by the defendants

of the agreement so far as related to the 300*l.*:—

Held, that the plea was a good answer to the action,—the continuance by the plaintiffs of all reasonable endeavours to obtain the bill being a condition precedent to their right to call upon the defendants for the 300*l.*, and the plea showing that they had failed to use such endeavours. *Leakey v. Lucas*, 734

#### CONTEMPT.

See COMMITMENT.

#### CONTRACT.

See [AGREEMENT.]

MARRIAGE.

PAYMENT INTO COURT.

#### CONVEYANCE.

See DEED.

#### COPYHOLD.

*Reasonable Fine on Admittance.*

A custom that the lord of a manor, in assessing the fine upon admittance of one not being a copyhold tenant on the Court rolls (except a customary heir claiming admittance as such), is not restricted in amount to any number of years' value of the tenement to which such admittance is made, is unreasonable and bad. *Douglas, app., Dysart (Earl), resp.*, 653

*Custom to entail*,—See DEVISE.

#### COSTS.

*Under the 14 & 15 Vict. c. 54, s. 4.*

1. In an action for the hire of two pianos, with a count in detinue for the pianos themselves, the defendant paid into Court the amount due for the hire, and (after the commencement of the action) delivered up the pianos. At the trial, the jury found that the value of the pianos was 130*l.*, and gave a verdict for the plaintiff for 1*s.* damages on the count in detinue:—

Held, that the plaintiff was entitled to costs, under the 14 & 15 Vict. c. 54, s. 4, the cause of action, at the time of its commencement, not being one for which a plaint could have been entered in the County Court. *Leader v. Rhys*, 369.

*Certificate under 23 & 24 Vict. c. 126, s. 34.*

2. In an action for false imprisonment and malicious prosecution, the plaintiff having recovered less damages than 5*l.*, the Judge certified, under the 23 & 24 Vict. c. 126, s. 34, as follows:—"I certify that this action was not really brought to try a right besides the mere right to recover damages, that the trespass was not malicious" (omitting "wil-

ful and"), "and that the action was not fit to be brought:"—Held, that the certificate was not sufficient. *Saunders v. Kirwan*, 514

#### COUNTY COURT.

*Costs under 14 & 15 Vict. c. 54, s. 4,—See COSTS.*

#### COUNTRY BANKER.

*See CHECK.*

#### COURT OF ASSIZE.

*Jurisdiction of Judges of,—See COMMITMENT.*

#### COURT OF RECORD.

*What constitutes,—See CAMBRIDGE CHARTER.*

#### DAMAGES.

*Measure of.*

1. By a particular section of the Act of incorporation of a railway Company, the owners of lands adjoining the line were empowered to lay down or extend either upon their own lands or on lands on the side thereof belonging to the Company, or upon the lands of any other persons, with the consent of such other persons, any collateral or continuous branch from such respective lands, &c., to communicate with the railway for the purpose of bringing carriages upon or across the same.

The plaintiff, in 1839, with the assent of the Company, made a siding on his land connecting the railway with a wharf part of which was in his own occupation and other part in that of certain tenants; and down to the year 1857 the Company carried coals and other goods for the plaintiff and his tenants, placing the trucks on the siding and so sending them down to the wharf. In the course of that year, however, the Company (with a view, as the jury thought, of diverting the trade from the plaintiff's wharf to another wharf in which they were interested) gave the plaintiff notice, under another section of their Act, that, after the 30th of September, they would no longer provide him with locomotive power for the conveyance of his goods along their line: and on the 1st of October they placed carriages and other things across the junction, for the purpose (as the jury found) of permanently obstructing and preventing the plaintiff and his tenants having access to the wharf by means of their railway.

Neither the plaintiff nor his tenants had availed themselves at this time of the authority given to them by the Act of Parliament to provide locomotive power of their own, and consequently they were not in a position to be *actually* obstructed. The tenants, however, finding their trade destroyed, removed from the plaintiff's wharf, and carried their business to the Company's wharf:—

Held, that these wrongful Acts of the Company constituted such a permanent obstruction and injury to the plaintiff's right to the use of his siding as to entitle him as reversioner to maintain an action. *Bell v. The Midland Railway Company*, 287

2. For the portions of the wharf occupied by his two tenants, the plaintiff was to be paid a certain royalty on coals sold,—the minimum royalty to be paid by one being 200*l.* per annum, and by the other 180*l.*: and the plaintiff was at the time of the obstruction complained of in treaty with a third person for letting him the remaining portion of the wharf at 300*l.* per annum:—Held, that the jury were warranted in taking these sums into their consideration in estimating the amount of damage the plaintiff had sustained. *Id.*

Held, also, per Willes, J., and Byles, J.,—that the case was one in which the jury were justified in giving exemplary damages. *Id.*

*And see JOINT STOCK COMPANY, 1, 2.*

#### DEED.

*Construction of.*

1. *Land bounded by a road.*—Where a piece of land which adjoins a highway is conveyed by general words, the presumption of law is, that the soil of the highway usque ad medium flum passes by the conveyance,—even though reference is made to a plan annexed, the measurement and colouring of which would exclude it. *Berridge v. Ward*, 400

[*Construction of,—See HIGHWAYS, 4, 5.*]

*Varying by Parol.*

3. An agreement between the administrator of the covenantee and the covenantor, not to enforce performance of the covenants in the deed provided the latter would pay certain rent, may be a good consideration for a parol promise to pay such rent; and the enforcement of such promise is not open to the objection that it is seeking to vary by parol the terms of an instrument under seal. *Nash v. Armstrong*, 259
4. And, *semble*, per Willes, J., that a recovery in such an action would afford a good equitable plea in bar to an action on the deed for the same rent. *Id.*

#### DEMURRAGE.

*See BILL OF LADING, 2.*

#### DETINUE.

*See COSTS.*

#### DEVISE.

*Construction of.*

The testator devised certain copyholds of the manor of Knaresborough to his nephew John

J. for life, remainder to James J., son of John J., and the heirs male of his body: "provided, always, that, in case the said James J. shall happen to depart this life without leaving issue male of his body lawfully begotten, him surviving, then I give and devise all my said real estate from and after the decease of the said John J. or James J., which shall last happen, unto my nephew George J., and his heirs and assigns for ever:"

Held, that, in the absence of a custom to entail within the manor of Knaresborough,—the existence of which the evidence set out in the case was found to be insufficient to establish,—the testator's nephew John J. took under the above devise an estate for life, and his grandnephew James J. a fee simple conditional, and that the devise over to the testator's nephew George J. was a good executory devise. *Hardcastle v. Dennison*, 606

#### DISCLAIMER.

See LANDLORD AND TENANT.

#### DIVORCE.

*Protection Order under 20 & 21 Vict. c. 85, s. 21.*

1. The 21st section of the Divorce Act, 20 & 21 Vict. c. 85, is not retrospective. *The Midland Railway Company, app., Pye, resp.*, 179
2. Where, therefore, a married woman whose husband had deserted her obtained a protection order from a magistrate under that section, after the commencement of an action by her in her own name to recover damages against a carrier for the loss of goods intrusted to him by her for carriage,—Held, that the order gave her no right to sue. *Id.*

#### DOWER.

*Barred by Adultery.*

A woman forfeits her dower, under the statute of Westminster 2, c. 34, by adultery, without reconciliation, even though she originally departed from her husband's house in consequence of his cruelty. *Woodward v. Dowse*, 722

#### EASEMENT.

*Light and Air.*

1. The owner of a windmill cannot claim, either by prescription, or by presumption of a grant arising from twenty years' acquiescence, to be entitled to the free and uninterrupted passage of the currents of wind and air to his mill. *Webb v. Bird*, 268
2. And such a claim is not within the 2d section of the 2 & 3 W. 4, c. 71, which is confined to rights of way or other easements to be exercised upon or over the surface of the adjoining land. *Id.*  
[Affirmed by the Court of Exchequer Chamber.]

#### EJECTMENT.

*On Forfeiture.*

Three quarters' rent being in arrear under a lease containing a clause of re-entry on non-payment of rent within twenty-one days after each quarter-day, the lessors, on the 3d of October, distrained, and after sale of the distress there remained due more than a quarter but less than a half year's rent. The lessors on the 2d of November served the lessee with a writ in ejectment under the 210th section of the Common Law Procedure Act, 1852:—Held, that the action was not maintainable, there not being half a year's rent in arrear at the time of the service of the writ. *Cotesworth v. Spokes*, 103

#### EQUITABLE PLEA.

See PLEADING.

#### ERROR.

*Bail in Error.*

Error having been brought upon a judgment for the plaintiff in this Court, a Judge's order was made, by consent, under which a sum of 3000*l.* was invested by the defendants in Consols. in the joint names of the respective attorneys, "in lieu of bail in error herein, to abide the further order of this Court." The judgment having been reversed by the Exchequer Chamber:—Held, that the defendants were entitled to have the proceeds of the stock restored to them. *Castrique v. Imrie*, 346

#### ESTATE FOR LIFE.

See DEVISE.

#### ESTOPPEL.

*By Judgment in a former Action.*

To an action for rent (or a sum in gross) under a building agreement dated the 29th of September, 1853, the defendant pleaded, that, after the making of that agreement, it was agreed between the parties that a tenancy from year to year should be created in substitution for the former tenancy under the agreement; that notice to quit was duly given, which notice expired at Michaelmas, 1858; that the defendant quitted accordingly; and that no rent ever became due from the defendant to the plaintiff in respect of the premises after the last-mentioned day.

To this plea, the plaintiff replied, by way of estoppel, that he brought an action against the defendant for the recovery of rent as having accrued due from the defendant to the plaintiff under the agreement in the declaration in this cause mentioned after the 29th of September, 1858; that the defendant, being under terms to plead issuably, pleaded to that action pleas which were not issuable

(but not the defence now set up); and that the plaintiff thereupon signed judgment, and thereby recovered the rent sued for in that action:—

Held, that the replication was bad,—the defendant not being estopped by his omission to set it up on the former occasion, from availing himself of the defence alleged in his plea. *Howlett v. Tarte*, 813

[By Tenancy,—See LANDLORD AND TENANT.]

## FACULTY.

See SALE, 3.

## FREE SIMPLE CONDITIONAL.

See DEVISE.

## FINE.

See COPYHOLD.

## FOREIGN JUDGMENT.

*Plea of Judgment recovered in a Foreign Court.*

A plea of judgment recovered in a foreign Court of competent jurisdiction must show that the judgment so recovered is final and conclusive between the parties according to the law of the place where such judgment is pronounced. *Frayes v. Worms*, 149

## [FORMER DECISION.]

*Acquiesced in by Legislature, cannot be reviewed.*

1. The trustees of certain public docks were by their Local Acts empowered to take tolls from vessels entering such docks, and the proceeds were to be applied to the repair and maintenance of the docks and harbour; and if the amount so raised should be more than sufficient for such purpose, then the tolls were to be lowered. By later Acts the trustees were empowered to raise money for building additional warehouses, and to levy rates for payment of the expenses, paying interest and maintaining the buildings so erected; but such additional warehouses were to be rateable to the poor as in the case of premises of which there was a beneficial occupation. *Mersey Docks and Harbour Board v. Jones*, 872]

2. A case, known as the Liverpool case, reported in 7 B. & C. 61, was decided in 1827, in which the parties were to all intents and purposes the same as in the present case, and the court held that the Dock Company were not rateable in respect of the dock dues, nor of the premises used for the purposes of the dock, no individual having any beneficial occupation of the premises:

Held in the present case (affirming the decision of the Court of C. B.), that, as the Legislature, by its declaration as to the rateability of the additional warehouses and

buildings created under the authority of the later Acts, had, by implication, acquiesced in the decision in the Liverpool case, it was not competent to this Court to interfere with that decision: and that therefore this particular property was exempt from poor-rates. *Mersey Docks and Harbour Board v. Jones*, 872]

## FRAUD.

See PARTNERSHIP.

## FREIGHT.

See BILL OF LADING, 1.

## GAOL.

See CAMBRIDGE CHARTER.

## HIGHWAY ACT.

See LEAMINGTON IMPROVEMENT ACT.

## HIGHWAYS.

*Surveyor's Accounts.*

1. A refusal by justices to make an order for the disallowance of a particular item in the accounts of a surveyor of highways, is ground for an appeal under the 20 & 21 Vict. c. 43. *Townsend, app., Read, resp.*, 308
2. The 111th section of the General Highway Act (5 & 6 W. 4, c. 50) enacts, that, if the inhabitants of any parish shall agree at a vestry to defend any indictment found against any such parish, or to appeal against any order made by or proceeding of any justice in the execution of any of the powers given by the Act, or to defend any appeal, it shall be lawful for the surveyor of such parish to charge in his account the reasonable expenses incurred in defending such prosecution, or prosecuting or defending such appeal, after the same shall have been agreed to by such inhabitants at a vestry or public meeting as aforesaid and allowed by two justices; which expenses, when so agreed to or allowed, shall be paid by such parish, &c.:—Held,—regard being had to the provision in the former Act, 13 G. 3, c. 78, s. 66,—that “and” in s. 111 of the 5 & 6 W. 4, c. 50, is to be read “or,” and consequently that the surveyor was entitled to charge such expenses after they had either been agreed to at a vestry or allowed by two justices. *Townsend, app., Read, resp.*, 317
3. *Quære*, whether the allowance of the surveyor's accounts, by the justices in special sessions under the 44th section of the 5 & 6 W. 4, c. 50, is a sufficient allowance by two justices within the meaning of s. 111? *Id.*

[*Presumption of Ownership of adjoining Strips of Land.*]

4. The ordinary presumption is, that strips of land lying along a highway, even though indirectly connected with parts of the waste, belong to the owner of the adjacent enclosed

land between which and the actual beaten road they lie, and not to the lord of the manor, especially if the adjacent owner has done acts of ownership without interruption upon the land. *Dendy v. Simpson*, 883

6. Such strips of land might well pass under a conveyance of the adjacent enclosure, though the deed purported to state the quantity of acres, within the fences, that were therein passed, if it had the words "more or less" added. *Id.*

#### HUSBAND AND WIFE.

*Conveyance of Wife's Property under 3 & 4 W. 4, c. 74.*

1. *Acknowledgment taken abroad. Provision for wife.*—The officer appointed under the 3 & 4 W. 4, c. 74, is justified in declining to receive and file an acknowledgment of a deed by a married woman, conveying her interest in certain property, where a provision is to be made for her in lieu of such her interest, and the commissioner merely certifies that the deed declaring the trusts of that provision "has been already engrossed, and was produced before him:" and the Court will not make any order on the subject until they are satisfied that the deed has been duly executed. *In re Lady Dallan*, 346

2. *Acknowledgment taken abroad. Identity of commissioners.*—A commission for taking the acknowledgment of a married woman abroad, under the 3 & 4 W. 4, c. 74, was addressed to "Robert Roger Strong, registrar of the Supreme Court of Wellington, New Zealand," and on its return the acknowledgment was found to have been taken by "Robert Rodger Strang, registrar of the Supreme Court of Wellington,"—Held, that the objection might be got over by a slight explanation on affidavit showing the identity of the party. *In re Anne Smith*, 344

3. *Affidavit, before whom sworn.*—But, held, that an objection that the affidavit was sworn before "J. K., a solicitor of the Supreme Court of W., and a commissioner for taking affidavits there," was insurmountable. *Id.*

*What Choses in Action of the Wife pass to the Assignees of the Husband.*

4. Where a right of action of the wife of a bankrupt or insolvent is of such a character, that, if vested in the bankrupt or insolvent alone, it would have passed to his assignees, the interest of the bankrupt or insolvent in such right of action of the wife passes to the assignees. *Richbell v. Alexander*, 324
5. Where, therefore, the cause of action is, the conversion by the defendant to his own use of the goods of the wife before marriage, without special damage,—substantially for the value of the goods,—it falls within the above rule, and the assignees are necessary parties to the action. *Id.*

6. Consequently, the action must be brought in the names of the assignees and the wife,—that being the only mode by which the assignees can, without the control or interference of the bankrupt, obtain the full benefit of the chose in action. *Richbell v. Alexander*, 324

#### INN.

See LICENSED VICTUALLER.

#### INSOLVENT DEBTOR.

*What choses in Action of the Wife pass to the Assignees of the Husband.*—See HUSBAND AND WIFE, 4—6.

#### INSPECTION.

*Of Private Books.*

In an action by a superintendent against a Railway Company for improperly dismissing him from their employ,—Held, that the plaintiff was entitled to have an inspection of all minutes or entries in the Company's books having any reference to the plaintiff's employment. *Hill v. The Great Western Railway Company*, 148

#### INTERROGATORIES.

*Under 17 & 18 Vict. c. 125, s. 51.*

1. It is no objection to interrogatories under the 51st section of the Common Law Procedure Act 1854, that they seek to obtain from the plaintiff admissions of conversations relating to the subject-matter of the action with a servant or agent of the defendants. *Rew v. Hutchins*, 829
2. Interrogatories cross-examining the plaintiff upon the terms and conditions of various prior transactions between the same parties, and not connected directly with the contract sued upon, not allowed. *Id.*
3. Nor as to the terms of any contract between the plaintiff and other persons. *Id.*
4. Nor, in cross-examination of the plaintiff, to disprove a custom on which the defendant supposes the plaintiff will rely. *Id.*
5. Interrogatories asking whether the plaintiff has had a correspondence relating to the subject in dispute, and asking for the dates and names of the places and the correspondents, will be allowed. *Id.*
6. The Court will allow any interrogatories to be administered under the 51st section of the Common Law Procedure Act, 1854, which are relevant to the matter in issue, and which the party interrogated would be bound to answer if in the witness-box. *Zychlinski v. Maltby*, 838

#### JOINT STOCK COMPANY.

*Powers and Authorities of Directors.*

1. By the deed of settlement of a joint stock Company, its business was declared to be "to build or purchase and own or hire iron

steam-vessels, and to use or let upon hire the same for the purpose of transport of coals or other merchandise from any port or ports of the united kingdom, or elsewhere, to any other port or ports of the united kingdom, or elsewhere:" and the powers of the directors were defined to be, amongst other things, "the building or purchasing or hiring of such steam-vessels as they should see fit," "the selling and letting to hire and chartering of the vessels," "the general conduct and management of the business of the Company," and "the controlling, managing, and regulating, in all other respects except as by those presents otherwise provided, of all matters relating to the Company, and the affairs thereof." The directors, thinking it expedient to sell all the vessels belonging to the Company, employed the plaintiffs, ship-brokers, to procure a purchaser. The plaintiffs accordingly negotiated a sale of the vessels upon the terms fixed by the directors, with one C.; the negotiation, however, went off, upon an objection urged by C.'s solicitor that the directors had no power to sell the whole of the vessels, except in the event of the winding up of the Company with the consent of the shareholders,—which had not been obtained:—Held, that the plaintiffs were not, under the circumstances, entitled to maintain an action against the directors upon an implied warranty, that they had authority to sell, which in point of fact they had not. *Wilson v. Miers*, 348

2. *Quære*, as to the measure of damages in such a case, if the action had been maintainable? *Id.*

#### Who a Shareholder.

3. By the Joint Stock Companies Act, 1856 (19 & 20 Vict. c. 47), sched. Table B. (1), it is provided that "no person shall be deemed to have accepted any share in the Company unless he has testified his acceptance thereof by writing under his hand in such form as the Company from time to time directs:" and s. 19 enacts that "every person who has accepted any share in a Company registered under this Act, and whose name is entered in the register of shareholders, and no other person (except a subscriber to the memorandum of association in respect of the shares subscribed for by him), shall for the purposes of this Act be deemed to be a shareholder."

A joint stock company, duly registered pursuant to the above statute (and the 20 & 21 Vict. c. 14), issued a prospectus, at the foot of which was printed a form of application for shares. The defendant paid the required deposit to the bankers of the Company, and filled up, signed and sent to the directors an application for shares, as follows:—"Gentlemen,—Having paid to the Bank of London to your credit 5*l.*, being a deposit of 5*s.* per share on twenty shares in the above Com-

pany, I request you to allot me that number of shares, and I hereby agree to accept the same, and undertake to pay the amount of calls that may be made thereon, in accordance with the Company's Act of incorporation." The company thereupon allotted to the defendant the number of shares he applied for, and his name was entered on the register of shareholders, and he paid two calls upon the shares so allotted to him. The defendant never testified his acceptance of the shares, in writing under his hand, otherwise than by signing the letter of application: and the Company never "directed" any other form: Held,—by analogy to the case of a contract for a specific ascertained chattel,—that the defendant's letter of application, agreeing to accept a specific number of shares afterwards allotted to him, was a sufficient acceptance of the shares to satisfy the statute. *The Bog Lead Mining Company v. Montague*, 481

#### JUDGE.

*Protection of*,—See CAMBRIDGE CHARTER.

#### JUDGE OF ASSIZE.

See COMMITMENT.

#### JUSTIFICATION.

[See TRESPASS.

#### JUSTICES.

See APPEAL.

#### LANDLORD AND TENANT.

*Occupation as Agent or Servant.*

An agent or servant who is allowed to occupy premises belonging to his principal for the more convenient performance of his duties, acquires no estate therein, although he be also allowed to use the premises for carrying on therein an independent business of his own. *White v. Bayley*, 227

#### Disclaimer of Landlord's Title.

2. Certain parish lands had been let to the labouring inhabitants at a forehand rent of 4*s.* per acre: the lands having been afterwards enclosed, the churchwardens and overseers for the time being increased the rent to 12*s.* per acre, for the purpose of raising a fund to pay the expenses of the enclosure. The tenants, having paid this increased rent for many years, conceiving that the enclosure expenses had been paid off, insisted that they were entitled to hold the land at the original rent of 4*s.* an acre, and refused to pay the 12*s.*:—Held, that this did not amount to a disclaimer of the landlords' title, so as to enable them to eject the tenants without notice. *Hunt v. Allgood*, 253
3. And, *semble*, that a tenancy from year to year might be implied from the circum-

stances under which the parties had held.  
*Hunt v. Allgood*, 253

4. The defendant had for several years occupied a cottage as tenant from week to week to one M. After the death of M., the defendant continued to pay his rent weekly to certain persons to whom M. had devised the premises. The devise being discovered to be void by reason of the Mortmain Act, the heir at law of M. by his agent demanded the rent whereupon the defendant said that he had received notice from the other party, and would not pay any more rent until he knew who was the right owner:—Held, that this did not amount to a disclaimer or repudiation of the title of the heir at law, so as to entitle him to eject the defendant without any notice to quit. *Jones v. Mills*, 788

[Tenant setting up his own Title, after Tenancy ended.]

Where a person, having possession of land under a good title, became tenant, and paid rent to a stranger:

Held, that he was not estopped, after his tenancy was determined, and before he had given up possession of the premises, from setting up his own prior title in an action of ejectment by his lessor. *Accidental Death Insurance Co. v. Mackenzie*, 870]

Notice to Quit.

6. Weekly tenant.]—*Semble*,—per Williams, J.,—that a tenancy from week to week can only be determined by a week's notice. *Jones v. Mills*, 688

And see DEED.

#### LEAMINGTON IMPROVEMENT ACT.

*Liability to Rates.*

By a Local Act, passed in 1825, for improving the town of Leamington, the commissioners were authorized to repair all the streets, &c., within the town; and by s. 47, it was enacted, that when any new streets, &c., within the town should be laid out and made, and the footpaths and carriage-roads thereof should be well and sufficiently flagged, paved, gravelled, and put in good order and repair to the satisfaction of the commissioners, then, on application of the owner of the soil, &c., it should be lawful for the commissioners, by writing under their hands, to declare the same to be public highways, and from and after such declaration made they should be repaired by the commissioners. By the 128th section the commissioners were empowered to make rates upon the tenants or occupiers of all dwelling-houses, &c., within the town; and by s. 27 every person assessed under or by virtue of the Act for or in respect of any messuages, &c., in the town, was to be exonerated, released, and for ever discharged from the performance of statute duty for the repairs of the public highways within the town.

In 1830, and before the passing of the General Highway Act, 5 & 6 W. 4, c. 50, a new street was formed in Leamington, called Springfield Street, which was dedicated to the public by the owner of the soil, and had ever since been used as a public highway; but the local commissioners had never declared it to be a public highway under the 47th section of the local Act.

The Public Health Act, 1848 (11 & 12 Vict. c. 63), was applied to the town of Leamington in 1852: and the local board, under the authority of the 69th section of that Act, made an order upon the owners of the premises abutting on Springfield Street, to repair, &c., the same:—

Held, that the parties were liable to be rated, Springfield Street not being a "highway" within the Public Health Act, the provision of the local Act having prevented it from becoming such in the absence of an adoption by the commissioners under s. 47. *Wallington, app., White, resp.*, 123

#### LEASE.

*Construction of.*

An agricultural lease contained a covenant on the part of the lessor, his heirs, &c., that he and they would "drain with proper drain-tiles, one rod apart, ten acres of the lands now in rye-grass, at his and their costs, except the carriage of the said drain-pipes, which is to be borne and paid by the lessee; and will drain the remainder of the lands hereby demised, in manner aforesaid, upon being paid a further yearly rent of 5*l.* for every 100*l.* so expended:—Held, that the words "in manner aforesaid" referred only to the mode of performing the work, viz., placing the drain-tiles one rod apart; and consequently that the tenant was not chargeable with the expense of carriage of the drain-pipes beyond the first ten acres. *Beer, app., Santer, resp.*, 435

#### [LEGISLATURE.]

*Effect of Acquiescence of in Decisions of the Courts,—See FORMER DECISION.]*

#### LICENSED VICTUALLER.

Who a "Traveller" within the 18 & 19 Vict. c. 118, s. 2.

A man who goes to a place a short distance from his home for the mere purpose of taking refreshment is not a "traveller" within the meaning of the exception in the 18 & 19 Vict. c. 118, s. 2: but one who goes to an inn for refreshment in the course of a journey, whether of business or of pleasure, and whether on foot or otherwise, is a "traveller" within the statute. *Taylor, app., Humphreys, resp.*, 429

## LIEN.

*Of Shipwright for repairs to a Ship,—See SHIPPING, 6.*

*And see SALE, 1, 2.*

## LIGHT.

*Obstruction of,—See PLEADING, 2.*

*And see EASEMENT.*

## LIMITATION OF ACTION.

*For an Act done by Public Trustees in Execution of the Powers vested in them by an Act of Parliament.*

1. Where a statute limits the period within which an action is to be brought for an act done or committed, if the cause of action be a single act, or one which amounts to a trespass (except it be a continuing trespass), the action must be brought within the prescribed period after the actual doing of the thing complained of: but, if the cause of action be, not the doing of the thing, but the resulting damage only, the period of limitation is to be computed from the time when the plaintiff sustained the injury. *Whitehouse v. Fellows*, 765

2. By the General Turnpike Act, 3 G. 4, c. 126, s. 147, all actions against trustees of any turnpike-road for anything done in pursuance of the Act must be commenced within three months after the fact committed. The trustees of a turnpike-road, acting bonâ fide in execution of the powers conferred upon them by their Act, converted an open ditch at the side of the road into a covered drain, placing gratings at intervals, with catch-pits, to carry off the water from the surface of the road into the drain: but, in consequence (as the jury found) of the negligent way in which the catch-pits were constructed and kept, the drain was in times of heavy rain insufficient to carry off the water in its accustomed channel, and it was consequently diverted to the plaintiff's land, and drowned his colliery:—

Held, that an action brought within three months after the damage sustained from this continuing nuisance was brought in time; that the trustees were liable; and that it was no misdirection on the part of the Judge to abstain from telling the jury that the defendants, as trustees acting gratuitously for the benefit of the public, were not responsible if they acted with reasonable skill and care and to the best of their judgment. *Id.*

*Promise to revive a Debt.*

3. In answer to an application for a debt barred by the Statute of Limitations, the defendant wrote,—“I have received a letter from Messrs. P. & L., solicitors, requesting me to pay you an account of 40*l.* 9*s.* 6*d.* I have no wish to have anything to do with

the lawyers; much less do I wish to deny a just debt. I cannot, however, get rid of the notion that my account with you was settled in 1851: but as you declare it was not settled, I am willing to pay you 10*l.* per annum until it is liquidated. Should this proposal meet with your approbation, we can make arrangements accordingly:”—Held, that this was not such an absolute unqualified acknowledgment and unconditional promise to pay as to take the case out of the Statute of Limitations. *Buckmaster v. Russell*, 745

## LUGGAGE.

*See RAILWAY COMPANY, 2, 3.*

*SHIPPING, 4.*

## MAGISTRATE.

*Protection of, under Jervis's Act, 11 & 12 Vict. c. 44,—See ABBEY LANDS ACT.*

*And see APPEAL.*

## MALICIOUS PROSECUTION.

*Endorsing a ca. sa. for more than due on the Judgment.*

The declaration stated that the defendants (the one, A., acting as attorney for B., the other) recovered a judgment against the plaintiff for 30*l.* 7*s.* 4*d.*, that the plaintiff paid and satisfied to B. the debt recovered by such judgment except the sum of 15*s.* 8*d.*, and that the defendants sued out a ca. sa. upon the judgment, and *wrongfully and maliciously, and without any reasonable or probable cause*, endorsed the said writ with directions to levy 5*l.* 14*s.* 8*d.*, and interest, and 1*l.* 7*s.* for the costs of execution; that the plaintiff tendered and offered to pay to the defendants 3*l.* 8*s.*, which was sufficient to pay and discharge all that was recoverable against the plaintiff upon the judgment and writ, together with the costs of the writ of execution and all other legal and incidental expenses; and that the defendants *wrongfully and maliciously, and without any reasonable or probable cause*, procured the sheriff to arrest the plaintiff, and detain him until he paid 7*l.* 6*s.* 9*d.*, whereas 3*l.* 8*s.* and no more was due and owing from and recoverable against the plaintiff upon the said judgment:—

Held, on demurrer, that the declaration disclosed a good cause of action, and that it was not necessary for the plaintiff to allege that he had obtained his discharge by order of the Court or a Judge, so as to show that the proceedings had terminated in his favour. *Gilding v. Eyre*, 592

## MARRIAGE.

*Breach of Promise of.*

It is no answer to an action for a breach of promise of marriage, that the plaintiff had

before the making of the promise been of unsound mind, and had been confined in a lunatic asylum, provided she was sane at the time of the promise. *Baker v. Cartwright*, 124

### MEASURE OF DAMAGES.

*See DAMAGES.*

### MEMORANDA.

*Queen's Counsel.*

Baggally, Brett, Chambers, Cleasby, Cole, Coleridge, Collins, Denman, Dugmore, Karlake, Liddell, Macqueen, Mellish, Mills, Price, Seymour, Smith, 2

*Serjeants.*

Hayes (patent of precedence), Wheeler, 1

### MILL.

*See EASEMENT.*

### MONEY PAID UNDER MISTAKE OF LAW.

*Where recoverable.*

M., in March, 1859, consigned oats to the correspondents of the plaintiffs at Melbourne for sale, the proceeds to be remitted to the plaintiffs, and against this consignment the plaintiffs accepted in favour of M. a bill at four months for 600*l.*, it being agreed that the plaintiffs should be repaid that sum out of the proceeds of the sale of the oats,—any deficiency to be made good by M., who was also to pay interest to the plaintiffs on the 600*l.* from the time the bill became due till the arrival in this country of the proceeds of the oats. In June, 1859, M. became bankrupt, the plaintiffs' acceptance remaining in his hands unnegotiated. The assignees of M. took possession of the bill, and paid it into the Bank of England, to the credit of the accountant in bankruptcy, for the estate of M.; and the bill was presented to the plaintiffs' bankers at maturity (July, 1859), and paid by them, the plaintiffs being in ignorance of the fact of its having remained in M.'s hands unnegotiated. The account sales of the shipment were received from Melbourne in March, 1860, showing that M.'s estate had been overpaid to the extent of 269*l.* 4*s.* 6*d.*:—Held, that the plaintiffs were not under the circumstances entitled to recover back that money from the assignees. *De Pass v. Bell*, 517

### MORTGAGE.

*See SHIPPING, 6.*

### NEGLIGENCE.

*In riding along a Public Highway.*

The plaintiff was driving a wagon with three horses along a highway, walking in the usual

way at the head of the leading horse, on his proper side of the road. The defendant and his groom were riding by at a foot pace (meeting the wagon on the wrong side), when, just as he passed the plaintiff, the groom touched his horse with a spur, and the horse kicked out and struck the plaintiff:—Held, that the act of using the spur when so near to the plaintiff was such an improper act on the part of the groom as to justify the jury in finding the defendant to have been guilty of negligence. *North v. Smith*, 572

*In leaving a Trap-Door open.*

2. Refreshment-rooms and a coal-cellar at a railway station were let by the Company to one S., the opening for putting coals into the cellar being on the arrival platform. A train coming in whilst the servants of a coal merchant were shooting coals into the cellar for S., the plaintiff, a passenger, whilst passing (as the jury found) in the usual way out of the station, without any fault of his own, fell into the cellar opening, which the coal merchant's servants had negligently left insufficiently guarded:—Held, that S., the occupier of the refreshment-rooms and cellar, was responsible for this negligence. *Pickard v. Smith*, 470
3. And *semble*,—per Williams, J.,—that the railway Company also would be liable, but not the coal merchant. *Id.*

### NEW TRIAL

*For Misdirection,—See RAILWAY COMPANY, 1.*

### NOTICE TO QUIT.

*See LANDLORD AND TENANT, 5.*

### NUISANCE.

*Construction of Nuisances Removal Act, 1855.*

The owner of a market, by her agent, placed hurdles in the public street for the purpose of penning sheep on market-days, for which she received certain tolls. The droppings of the sheep created a nuisance on the pavement, which the justices, on summons under the Nuisances Removal Act, 1855, 18 & 19 Vict. c. 121, held to have been created by the "act, default, permission, or sufferance" of the owner of the market, within the meaning of the 12th section of the Act, and made an order upon her to remove the same:—Held, that the decision of the justices was correct. *Draper, app., Sperring, resp.*, 113

*Continuing Nuisance,—See LIMITATION OF ACTION, 1, 2.*

### PAROL.

*Varying Deed by,—See DEED, 2.*

### PARTICULARS.

*See PAYMENT INTO COURT.*

## PARTNERSHIP.

*Contract of.*

To an action for the breach of an agreement to enter into partnership with the plaintiff, the defendant pleaded, that, before and at the time of the making of the agreement, the plaintiff carried on trade in partnership with one S., which partnership was then about to be wound up and dissolved; that the defendant made the agreement on the faith and under the belief that the plaintiff had up to that time acted with honesty towards his said partner in the conduct of the said business and in relation to the pecuniary affairs thereof; but that, after the making of the agreement and before breach, and before the commencement of the suit, the defendant discovered that the plaintiff had before the time of making the agreement acted with fraud and dishonesty towards his said partner in the conduct of the said business and in relation to the pecuniary affairs thereof, which said fraudulent and dishonest acts of the plaintiff were unknown to the defendant at the time of his entering into the agreement in the declaration mentioned,—wherefore the defendant repudiated and declined to carry into effect the said agreement:—Held, that this plea afforded no answer to the action. *Andrewes v. Garstin*, 444

## PAYMENT INTO COURT.

*Particulars of.*

1. Particulars of the parts of the plaintiff's claim in respect of which money is paid into Court, will not be ordered, except under very special circumstances. *The Thames Iron Works and Ship-building Company v. The Royal Mail Steam-Packet Company*, 375
2. The Court refused to order such particulars to be given in an action for extras and alterations upon a ship-building contract. *Id.*

## PLEADING.

*Equitable Pleas.*

1. An agreement between the administrator of the covenantee and the covenantor, not to enforce performance of the covenants in the deed provided the latter would pay certain rent, may be a good consideration for a parol promise to pay such rent; and *semble*, per Willes, J., that a recovery in such an action would afford a good equitable plea in bar to an action on the deed for the same rent. *Nash v. Armstrong*, 259
2. The plaintiff complained in his first count of an obstruction of the light and air to his ancient windows; in the second count, of the raising and erecting of certain walls and buildings by the defendant, whereby the smoke and vapour from the plaintiff's chimneys were prevented from being carried off; and in the third count, that the defendant

had deprived his house of the support which he was entitled to.

The defendant pleaded, by way of equitable defence, that the grievances in the declaration mentioned were occasioned by the pulling down and rebuilding of the defendant's house, that the plaintiff had notice of the premises, and that the old building was pulled down and the new one erected, and large sums of money were expended thereon by the defendant, with the knowledge, acquiescence, and consent of the plaintiff, and on the faith that the plaintiff so knew of, acquiesced in, and consented to the defendant's so pulling down and rebuilding as aforesaid. [By arrangement this plea was not to be relied on as a good plea of leave and license at common law.]

The plaintiff replied that the plaintiff acquiesced and consented as in the plea mentioned, upon the faith of certain false representations theretofore made to him by the defendant and her agents, that the grievances in the declaration contained would not result from or be produced by the said pulling down and rebuilding:—

Held, on demurrer to the plea, that it afforded a good defence on equitable grounds: *Davies v. Marshall*, 697

3. Held also, on demurrer to the replication, that it was a good equitable answer to the plea. *Id.*
4. The second count of the declaration stated, that, in consideration that the plaintiff then agreed with the defendant to sell and transfer to him by the 22d of January then next the lease of a farm for 500*l.*, and the implements, stock, &c., at a valuation to be thereafter made, the defendant agreed to purchase the same upon the terms aforesaid, subject to his being approved of as a tenant by Lord S., and also, among other things, then at and upon the making of the agreement to pay down to the plaintiff 500*l.* as a deposit, and to complete the purchase and pay the amount of the valuation by the said 22d of January; that, the defendant being unable to pay the 500*l.* at and upon the making of the said agreement, in consideration that the plaintiff, at the request of the defendant, dispensed with the said payment down of the 500*l.* and would take the defendant's I. O. U. for the same, the defendant promised the plaintiff that he would pay him the 500*l.* as soon as he could write to his banker at Berwick and procure his said banker to remit the same: General averment, and breach that the 500*l.* was not paid.

Sixth plea,—on equitable grounds,—that, before the commencement of the action, and before any demand by the plaintiff of payment of the I. O. U., the defendant was disapproved of as a tenant by Lord Salisbury, and the plaintiff was thereby rendered unable to sell

and transfer the lease to the defendant:—  
Held, not a good equitable defence, inasmuch as the plea disclosed no ground upon which the defendant could be entitled to an injunction in a Court of equity. *Davis v. Nisbett*, 752

5. Replication to the sixth plea,—that it was part of the agreement that the 500*l.* should be forfeited in case of non-completion of the agreement by the defendant on the said 22d of January; that it was arranged and agreed between the plaintiff and defendant, that, for the purpose of obtaining the defendant's being approved as a tenant by Lord S., the defendant should apply to Lord S. to accept him as such tenant; and that, before any disapproval of Lord S. as in that plea mentioned, the defendant wrote and applied to Lord S. to accept him as such tenant, and afterwards, and before any such disapproval as in the plea mentioned, the defendant withdrew such application, and declined to be accepted as such tenant by Lord S.; and that such disapproval of Lord S. as in the plea mentioned was procured and occasioned by the act of the defendant, and from his unwillingness to fulfil the agreement, and not otherwise:—  
Held, that, assuming the sixth plea to the second count to be good the replication was a good answer to the plea. *Id.*

*Judgment Recovered in a Foreign Court,—See FOREIGN JUDGMENT.*

#### [POOR-RATES.

*See FORMER DECISION.]*

#### PRACTICE.

##### *Inspection of Documents.*

1. In an action by a superintendent against a Railway Company for improperly dismissing him from their employ,—Held, that the plaintiff was entitled to have an inspection of all minutes or entries in the Company's books having any reference to the plaintiff's employment. *Hill v. The Great Western Railway Company*, 148

##### *Payment of Money into Court.*

2. Particulars of the parts of the plaintiff's claim in respect of which money is paid into Court will not be ordered, except under very special circumstances. *Thames Iron Works and Ship-Building Company v. The Royal Mail Steam-Packet Company*, 375
3. The Court refused to order such particulars to be given in an action for extras and alterations upon a ship-building contract. *Id.*

*Bail in Error,—See ERROR.*

*Staying Proceedings,—See BANKRUPT.*

#### PRESCRIPTIVE RIGHT.

*See EASEMENT.*

#### PRESENTMENT.

*See CHECK.*

#### PROMOTIONS.

*See MEMORANDA.*

#### PROTECTING ORDER.

*See DIVORCE.*

#### [QUANTUM MERUIT.

*What recoverable under,—See ASSUMPSIT.]*

#### RAILWAY COMPANY.

##### *Injury to Property from Engines.*

1. In an action for injury by fire alleged to have been caused by a locomotive, it was proved on the part of the plaintiff that the fire broke out shortly after the passing of the defendants' engine, and that that engine had none of the appliances which had been long in use to prevent sparks or hot cinders issuing from the chimney or the fire-box, and that there was no other way of accounting for the fire than assuming it to have been caused by a spark or cinder from the engine. For the defendants, the evidence of several scientific witnesses was to the effect that the engine in question was so constructed that it was unnecessary to provide any of the safeguards suggested by the plaintiff's witnesses, and that it was impossible that sparks or cinders could have been thrown out by it so as to cause the damage complained of. In his summing up, the learned Judge, after a careful recapitulation of the evidence on both sides, left it to the jury to say whether or not there had been negligence on the part of the Company either in using an improperly constructed engine or in improperly using an engine of the description mentioned by the defendants' witnesses:—Held, no misdirection. *Fremantle v. The London and North Western Railway Company*, 89

##### *Loss of Passenger's Luggage.*

2. By their Act of Parliament and their published notices a railway Company were bound and professed to allow each passenger to take with him his ordinary luggage, not exceeding a given weight, without any charge for the carriage. The plaintiff, a passenger by the railway,—who was found to have had no knowledge of the Act of Parliament or the notice,—brought with him as luggage a box containing only merchandise, but not exceeding in weight the limit prescribed for personal luggage. On the box was written in large letters the word "Glass." No information was given by the plaintiff to the Company's servants, nor was any inquiry made by them, as to the contents of the box:—Held, in an action against the Company for the loss of the box, that, inasmuch as it

contained merchandise only, and not personal luggage, there was no contract on the part of the Company to carry it, and consequently they were not liable for the loss. *Cahill v. The London and North Western Railway Company*, 154

[Affirmed on appeal.]

3. And *semble*,—per Erle, C. J., and Willes, J.,—that the provisions of the Act of Parliament as to the gratuitous carriage of the personal luggage of passengers must be taken to have been known to the plaintiff. *Id.*

#### *Obstruction of Right to use the Railway.*

4. By a particular section of the Act of incorporation of a railway Company, the owners of lands adjoining the line were empowered to lay down or extend either upon their own lands or on lands on the side thereof belonging to the Company, or upon the lands of any other persons, with the consent of such other persons, any collateral or continuous branch from such respective lands, &c., to communicate with the railway for the purpose of bringing carriages upon or across the same.

The plaintiff, in 1839, with the assent of the Company, made a siding on his land connecting the railway with a wharf part of which was in his own occupation and other part in that of certain tenants; and down to the year 1857 the Company carried coals and other goods for the plaintiff and his tenants, placing the trucks on the siding and so sending them down to the wharf. In the course of that year, however, the Company (with a view, as the jury thought, of diverting the trade from the plaintiff's wharf to another wharf in which they were interested) gave the plaintiff notice, under another section of their Act, that, after the 30th of September, they would no longer provide him with locomotive power for the conveyance of his goods along their line: and on the 1st of October they placed carriages and other things across the junction, for the purpose (as the jury found) of permanently obstructing and preventing the plaintiff and his tenants having access to the wharf by means of their railway.

Neither the plaintiff nor his tenants had availed themselves at this time of the authority given to them by the Act of Parliament to provide locomotive power of their own, and consequently they were not in a position to be *actually* obstructed. The tenants, however, finding their trade destroyed, removed from the plaintiff's wharf, and carried their business to the Company's wharf:—

Held, that these wrongful Acts of the Company constituted such a permanent obstruction and injury to the plaintiff's right to the use of his siding as to entitle him as reversioner to maintain an action. *Bell v. The Midland Railway Company*, 287

5. For the portions of the wharf occupied by his two tenants, the plaintiff was to be paid a certain royalty on all coals sold,—the minimum royalty to be paid by one being 200*l.* per annum, and by the other 180*l.*: and the plaintiff was at the time of the obstruction complained of in treaty with a third person for letting him the remaining portion of the wharf at 300*l.* per annum:—Held, that the jury were warranted in taking these sums into their consideration in estimating the amount of damage the plaintiff had sustained. *Bell v. The Midland Railway Company*, 287

6. Held, also, per Willes, J., and Byles, J.,—that the case was one in which the jury were justified in giving exemplary damages. *Id.*

#### *Powers of Directors.*

7. *Ultra vires.*]—The plaintiffs, a railway Company having a branch terminating at Milford Haven, declared upon a contract whereby the defendant undertook to provide a suitable steam-vessel to run between that place and Dublin and Cork for the conveyance of passengers, goods, &c., in connection with the railway; and alleged for breach, that the defendant provided a vessel which was unseaworthy and a master who was incompetent, whereby certain pigs and cattle intrusted to them for carriage were damaged and lost.

Plea, that the agreement mentioned in the declaration was entered into contrary to and in violation of the purposes for which the plaintiffs' Company was incorporated, and was one which the Company could not lawfully enter into, and was void:—

Held, that there was no illegality of contract apparent on the face of the declaration,—the contract as set out being strictly in furtherance of the objects of the Company's incorporation; and that the plea afforded no answer. *The South Wales Railway Company v. Redmond*, 675

And see NEGLIGENCE.

#### ROAD.

*What passes by Conveyance,—See DEED.*

#### SALE.

##### *Property, how passed.*

1. A. agreed to build an organ for B. and to fix it in the parish church of C. for 768*l.* to be paid by certain yearly instalments. The agreement then provided, that, "in the event of the said organ being completed and erected as aforesaid, and the said sum of 768*l.* or any part thereof not being paid at the time or times thereinbefore mentioned, then it was thereby declared and agreed that the whole sum or balance, with the interest then due thereon, should become due and payable to A., and might be sued for and recovered accordingly: and in the mean time,

and until the said balance and interest should be paid and discharged, A. should have a lien on the said organ; and, in default of any or either of such payments as aforesaid at the time or times thereinbefore mentioned, A. might either dispose of or remove the said organ as he might think proper:—Held, that the property in the organ remained in A. until the instalments were paid. *Walker v. Clyde*, 381

2. The instalments being unpaid, A. demanded the organ of the vicar of C. and the churchwardens. The vicar kept the church door locked, and refused to allow the organ to be removed, claiming a lien upon it. The churchwardens did nothing:—Held, that the vicar was liable in trover, and not the churchwardens. *Id.*
3. *Semble*, that the absence of a faculty for the removal of the organ was no answer to the plaintiff's claim. *Id.*

#### *Sale of Goods subject to a Condition.*

4. Upon a treaty for the sale of hops (by sample), the proposed buyer asked the seller if any sulphur had been used in the growth or treatment of them, adding that he would not ask the price if sulphur had been used. The seller thereupon asserted that no sulphur had been used. After the hops had been inspected, weighed, and delivered, the buyer discovered that sulphur had been used in the cultivation of a portion of the hops,—5 acres out of 300. The whole growth, however, was so mixed up together that it was impossible to separate the sulphured from the unsulphured hops. The jury having found that the representation had been made, and was false (but without fraud), and that the buyer had entered into the contract entirely on the faith of that representation:—Held, that the representation amounted to a condition, and therefore that the buyer was entitled to repudiate the contract. *Bannerman v. White*, 844

*Of Specific Chattel*,—See JOINT STOCK COMPANY, 3.

#### SERVANT.

*Occupation of Premises as*,—See LANDLORD AND TENANT, 1.

#### SHIPPING.

##### *Construction of Charter-Party.*

1. By a charter-party which was negotiated by A. as agent of B., the charterer (B.) engaged to pay a lump freight of 735*l.* for a voyage to the coast of Africa and back to London, payable in cash on correct delivery of the return cargo: and the charter-party contained the following clause,—“The master to sign bills of lading at any rate of freight, without prejudice to this charter.” B., the charterer, shipped certain oil on his

own account for London, for which the master signed a bill of lading making the oil deliverable to A. or assigns, “he or they paying freight for the said goods as usual.” This bill of lading B. endorsed to A. in part payment of advances made by him on the purchase of the outward cargo:—Held, that, A. having notice of the terms of the charter-party,—the owner was entitled to a lien on the oil for the entire charter freight. *Kern v. Deslandes*, 205

##### *Construction of Bill of Lading.*

2. *Liability of assignee for freight.* See *Kern v. Deslandes*, 205
3. *Liability of assignee for demurrage.*—A cargo of potatoes was shipped from Dunkirk to London under a charter-party by which the charterer contracted to pay certain freight, and was to have sixteen days for loading and unloading, and to pay 2*l.* per day for any detention of the vessel beyond that period. By the bill of lading, the cargo was deliverable to the consignees in London, or order, “he or they paying freight as per charter-party.” In the margin of the bill of lading was the following memorandum—“There are eight working days for unloading in London:—”

Held, that the consignees, by accepting the cargo under this bill of lading, incurred no liability for demurrage, although the vessel was detained for four days beyond the time mentioned. *Chappel v. Comfort*, 802

##### *Conditional Contract for Conveyance of Passengers and Luggage.*

4. The plaintiff took a passage by a ship belonging to the defendants, from New York to Galway, on the terms contained in a passage ticket in which were, amongst others, the following conditions:—

“The ship will not be accountable for luggage, goods, or other description of property, unless bills of lading have been signed therefor.”

“Each first and second class adult passenger allowed to have 20 cubic feet of luggage free; but no merchandise, plate, jewellery, precious stones, specie, or bullion will be carried as luggage.”

In the course of the voyage, the ship, through the negligence of the captain, was lost, together with the plaintiff's luggage:—Held, that the conditions upon which the defendants received the plaintiff as a passenger absolved them from liability for such loss. *Wilton v. The Atlantic Royal Mail Steam-Navigation Company*, 453

5. The ticket also contained the following stipulation,—as to the effect of which the Court gave no opinion,—“In case of the loss or detention of the ship during the voyage by any of the accidents of navigation, or by any dangers of the sea, no liability of any kind is to attach to the proprietors.” *Id.*

*Rights and Liabilities of Mortgages of a Ship.*

6. The mortgagor of a ship, who remains in the ostensible ownership, has an implied authority to confer a right of lien for repairs necessary to keep her seaworthy,—notwithstanding the 70th section of the Merchant Shipping Act, 1855 (17 & 18 Vict. c. 104), which enacts that “a mortgagee shall not by reason of his mortgage be deemed to be the owner of a ship, or any share therein, nor shall the mortgagor be deemed to have ceased to be owner of such mortgaged ship or share, except in so far as may be necessary for making such ship or share available as a security for the mortgage-debt.” *Williams v. Allsup*, 417

[*Rights of Mortgagor*,—See BAILMENT.]

STATUTE OF LIMITATIONS.

See LIMITATION OF ACTION.

SUPERIOR COURT.

See COMMITMENT.

SURETY.

*Contribution between Co-Sureties.*

A., for the purpose of raising money, drew a bill upon B., which B. accepted. Being unable to get the bill discounted without a third name, A. procured C. to endorse it. The bill being unpaid at maturity, the holder agreed to renew it; and accordingly a fresh bill was drawn by B. upon A., and endorsed by C. B. having been compelled to pay the whole amount,—Held, that he was entitled to sue C. for contribution. *Reynolds v. Wheeler*, 561

SURVEYOR OF HIGHWAYS.

*Allowance of Accounts*,—See APPEAL.

TRAVELLER.

See LICENSED VICTUALLER.

TRESPASS.

*Retaking Possession of a Man's own Goods.*

1. The owner of goods (or his servants acting by his command) which are wrongfully in the possession of another, may justify an assault in order to repossess himself of them, no unnecessary violence being used. *Blades v. Higgs*, 713
2. To a count for assaulting the plaintiff, the defendants pleaded that the plaintiff had wrongfully in his possession dead rabbits belonging to the Marquis of E., and was about wrongfully and unlawfully to carry away and convert them to his own use, whereupon the defendants, as the servants of the marquis, and by his command, requested the plaintiff to refrain from carrying away and converting the rabbits, which he refused to do, whereupon they, as the servants of the marquis, and by his command,

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molliter manus imposuerant, using no more force than was necessary to take the rabbits from him:—Held, a good plea. *Blades v. Higgs*, 713

TROVER.

See SALE, 1, 2.

TRUSTEES OF A ROAD.

See LIMITATION OF ACTION, 1, 2.

TURNPIKE TRUSTEES.

See LIMITATION OF ACTION, 1, 2.

VAGRANT ACT.

*Deceitful Children.*

A woman obtained an order for the admission of herself and her two children (aged respectively seven and four years) into the workhouse of the union of the borough within which her place of abode was situate, and at six in the evening took the children to the outer gate of the workhouse and left them there with the order, returning herself to her own house:—Held, not a “running away” from her children within the 4th section of the Vagrant Act, 5 Geo. 4, c. 83. *The Guardians of the Poor of the Cambridge Union*, app., *Parr*, resp. 99

WARRANT.

See CAMBRIDGE CHARTER.

WARRANTY.

See SALE, 4.

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WINDMILL.

See EASEMENT.

WITNESS.

*Commitment of, for Contempt*,—See COMMITMENT.

WOLVERHAMPTON WATERWORKS ACT.

*Construction of.*

By the 35th section of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), it is enacted that the undertakers shall provide and keep in the pipes to be laid down by them a supply of pure and wholesome water, &c.; “and such supply shall be constantly laid on at such a pressure as will make the water reach the top story of the highest houses within the limits of the special Act, unless it be provided by the special Act that the water to be supplied by the undertakers need not be constantly laid on under pressure:” and by s. 42 it is enacted that “the undertakers shall at all times keep charged with water, under such pressure as aforesaid, all their pipes to

which fire-plugs shall be fixed, unless prevented by frost, unusual drought, or other unavoidable cause or accident, or during necessary repairs."

In 1845, a Company was formed for supplying water to the town of W., under an Act of Parliament (8 & 9 Vict. c. cxxxv.) which contained no provision for supplying water at high pressure. In 1850, the works of that Company were authorized to be extended by an Act (13 & 14 Vict. c. lxxiv.), the 1st section of which declared that "the Waterworks Clauses Act, 1847, with respect to the construction of the waterworks," should be incorporated therewith.

In 1855, a new Company was formed for the better supplying with water the town of W., the suburbs thereof, and the parishes and places adjacent thereto, by an Act of 18 & 19 Vict. c. cli., by the 1st section of which

it was enacted that the Waterworks Clauses Act, 1847 (amongst others), "should, except as therein otherwise provided, be incorporated with and form part of that Act;" and by the 40th section it was provided that "the water to be supplied from any pipe of the Company need not be constantly laid on under pressure."

In 1856, the two Companies were amalgamated under an Act of 19 & 20 Vict. c. lvii., the 3d section of which contained a general provision incorporating the Waterworks Clauses Act, 1847, therewith:—

Held, that the amalgamated Company was not liable to the high pressure obligation contained in the 35th or 42d sections of the general Act. *Purnell, app., The Wolverhampton New Waterworks Company, resp.*

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